Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, *et al.*,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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159 pp

QUESTIONS PRESENTED

I.

Whether the court of appeals erred in holding that a state constructively waived its constitutional sovereign immunity by not forbidding a state public service commission from fulfilling regulatory responsibilities under the Telecommunications Act, where Congress lacks the constitutional power under the Commerce Clause to condition a state's performance of those responsibilities on waiver of the state's immunity and after *College Savings* waivers of immunity must be deliberate, express waivers made by the state itself.

II.

Whether the court of appeals erred in holding that the *Ex parte Young* exception to the Eleventh Amendment applied to the conduct of state public service commissions in arbitrating, reviewing, and approving interconnection agreements under the Telecommunications Act of 1996, where Congress did not authorize suits against state commissioners under the Act, the conduct complained of is completed and will not recur, and the conduct complained of is not alleged to violate the Constitution.

PARTIES TO THE PROCEEDING

The petitioners are the Illinois Commerce Commission and Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, in their official capacities as Commissioners of the Illinois Commerce Commission.

The respondents are MCI Telecommunications Corp., MCIMetro Access Transmission Services, Inc., the Illinois Bell Telephone Company d/b/a Ameritech Illinois; the United States of America, the Federal Communications Commission; the Public Service Commission of Wisconsin and Ave M. Bie, John H. Farrow, Joseph P. Mettner, in their official capacities as commissioners of the Public Service Commission of Wisconsin; and Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin.

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The Illinois Commerce Commission and its Commissioners (collectively "ICC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. This petition for certiorari seeks review of the court of appeals' decision holding that Illinois constructively waived its constitutional sovereign immunity by not forbidding the ICC from carrying out its responsibilities under the Act and by allowing the ICC to continue to regulate telephone service in the state. It also seeks review of the court's decision holding that the *Ex parte Young* doctrine afforded an alternative basis for lifting the eleventh amendment bar.

OPINIONS BELOW

The opinion of the Court Appeals for the Seventh Circuit in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n* is reported at 222 F.3d 323 and is reprinted in the Appendix at pages 1a-54a. The court of appeals' opinion prior to rehearing is reported at 183 F.3d 558, and is reprinted in the Appendix at pages 55a-73a. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is unreported, and is reprinted in the Appendix at pages 74a-104a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *MCI* was entered on July 24, 2000. On October 23, 2000, Justice Stevens granted the ICC a 14-day extension of time for filing a petition for a writ of certiorari through November 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

1. The Commerce Clause, U.S. art. I, § 8 cl. 3 (Pet. App. 105a).
2. The Spending Clause, U.S. art. I, § 8 cl. 1 (Pet. App. 105a).
3. The Supremacy Clause, U.S. art. VI, cl. 2 (Pet. App. 105a)
4. U.S. Const amend. XI (Pet. App. 105a-106a).

STATUTES

1. Section 252 of the Telecommunications Act of 1996 (Pet. App. 106a-117a).
2. Section 601 of the Telecommunications Act of 1996 (Pet. App. 118a).

STATEMENT OF THE CASE

For nearly a century, states alone regulated telephone service within their boundaries. The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, codified a system of dual state and federal regulation over telephone service. In general, it granted the Federal Communications Commission ("FCC") jurisdiction over all interstate and foreign communications by wire or radio and expressly reserved jurisdiction over intrastate communications by wire or radio to the States. *Id.* § 152(a),(b); *see generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

A. Telecommunications Act of 1996

On February 8, 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act" or "Act"), which amended the Communications Act of 1934. The Act alters the traditional federal-state jurisdictional balance, creating in sections 251 and 252 what the FCC has termed "parallel jurisdiction." *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 13042 (1996), at ¶ 85. Sections 251 and 252 grant the FCC jurisdiction over certain intrastate aspects of telecommunications and the states jurisdiction over certain aspects of interstate telecommunications. In addition, the Act expressly preserves existing state access and interconnection regulations and expressly allows states to prescribe additional regulations so long as those regulations are not inconsistent with the Act. 47 U.S.C. §§ 251-52. Moreover, the Act explicitly forecloses implied preemption of state law in § 601. More generally, the Act preserves the dual jurisdiction federal-state regulatory model, where not expressly modified. *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 731 n.8 (1999) ("*Iowa Utilities*")

Acknowledging the vast knowledge and expertise states have with respect to local telephone markets, Congress gave states a critical role in implementing portions of the Act and opening local telephone markets to competition. The Act imposes general duties on all telecommunications carriers and further obligations on all local exchange carriers ("LEC"). 47 U.S.C. § 251(a), (b). Recognizing that new entrants to the local telephone market would not be able to

rapidly and efficiently duplicate the facilities developed over time by incumbent LECs, Congress imposed additional obligations on incumbent LECs, like Ameritech Illinois, to, among other things, allow new entrants to "interconnect" with their networks, gain unbundled access to discrete elements of their networks, and purchase their telecommunications services for resale at wholesale prices. *See id.* § 251(c). The means of obtaining interconnection, unbundled access, and resale are through agreements negotiated in accordance with section 252 of the Act.

B. The MCI/Ameritech Illinois Interconnection Agreement.

MCI and Ameritech Illinois attempted to negotiate a binding interconnection agreement, but were unable to agree on all of its rates, terms and conditions. As provided for by section 252(b) of the federal Act, MCI filed a petition with the ICC seeking arbitration of various open, unresolved issues. The ICC resolved the open issues, setting forth its findings and conclusions in a written arbitration decision. MCI and Ameritech Illinois incorporated the arbitration decision's findings and conclusions into the agreement. They combined the arbitration decision with the predominantly negotiated rates, terms and conditions, and submitted the resulting interconnection agreement to the ICC for approval as required by section 252(a). On April 28, 1997, the ICC approved the interconnection agreement under section 252(e)(2). Pet. App. 12a.

C. The Proceedings Below

Dissatisfied with several aspects of the ICC's decision, however, MCI filed an action in federal district court against the ICC and Ameritech Illinois seeking review of the ICC's order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Ameritech Illinois filed a cross-claim against the ICC and a counterclaim against MCI taking issue with one aspect of the decision. The ICC immediately moved to dismiss all claims against it on Eleventh Amendment sovereign immunity grounds. The ICC maintained that the claims against it were in reality claims against Illinois and, therefore, barred by the Eleventh Amendment. The district court denied the motions, determining that the ICC constructively waived Illinois' sovereign immunity or, in the alternative, that the *Ex party Young* exception to the Eleventh Amendment allowed the action against the Commissioners. Pet. App. 14a-16a.

The ICC appealed to the Seventh Circuit.[1] On February 10, 1999, the Seventh Circuit in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 558 (7th Cir. 1999) (Pet. App. 55a), affirmed the district court's denial of the motions to dismiss. The Seventh Circuit held, as did the district court, that the ICC constructively waived its Eleventh

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1 Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding appeal of district court order denying a claim of Eleventh Amendment immunity permissible under the collateral order doctrine).

Amendment immunity by voluntarily choosing to carry out the arbitration and approval functions as provided in section 252 of the Act while fully aware that the Act provides for federal review of such actions. Pet. App. 73a. Having found constructive waiver, the Seventh Circuit declined to address whether the *Ex parte Young* exception to the Eleventh Amendment offered an additional basis for jurisdiction. *Id.* at 73a n.4. The ICC filed a timely petition for rehearing and rehearing *en banc*.

On June 23, 1999, this Court issued *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), three opinions involving state sovereign immunity. Two days later, on June 25, 1999, the Seventh Circuit granted the petition for rehearing, requested supplemental briefs addressing the applicability of the three opinions, and restored the case to the calendar for oral argument. [2]

On rehearing, the Seventh Circuit affirmed its earlier decision. *MCI v. Illinois Commerce Comm'n*, No. 98-2127 (7th Cir. July 24, 2000) (Pet. App. 1a). The court began by restating its previous holding that the 1996 Act contemplates

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2 Shortly after the *MCI* court granted rehearing, several appeals were taken from Judge Crabb's decision in *Wisconsin Bell v. Public Service Commission of Wisconsin*, 57 F.Supp.2d 710 (W.D. Wis. 1999), granting the Wisconsin Public Service Commission's motions to dismiss based on the Eleventh Amendment. The court consolidated the Wisconsin appeals with the *MCI* appeal for purposes of argument and disposition.

that state commissions be parties to suits in federal district courts under 252(e)(6) of the Act. Pet. App. 28a. Next, the court rejected the idea that Congress abrogated the States' sovereign immunity, but the court affirmed its previous holding that state commissions constructively waive their immunity by performing the responsibilities given to them in the Act. The court concluded that constructive waiver of sovereign immunity under the commerce clause is still valid after *College Savings*. *Id.* at 31a-35a. The court then affirmed its previous conclusion that Congress solicited a waiver of states' sovereign immunity as a condition for fulfilling their responsibilities under the Act, finding the structure of the Act provided the requisite clarity. *Id.* at 35a-38a. In the court's view, "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 38a. Finally, the court went on to find that Illinois accepted that condition by failing to forbid the ICC from performing the responsibilities given to it in the Act. *Id.* at 38a-45a. In reaching its decision, however, the court expressly acknowledged that its constructive waiver holding conflicted with the view of the Court of Appeals for the Sixth Circuit. *Id.* at 45a n.12.

Besides finding a constructive waiver, the court applied the *Ex parte Young* exception to the Eleventh Amendment. The court found that because the carriers' claims alleged ongoing violations and requested prospective relief, they came within the *Ex parte Young* exception. Pet. App. 45a-47a. Specifically, in the court's view, since the ICC's

arbitration determinations "are still in place" and the carriers were seeking an injunction to "conform the [Commissioners'] future actions, including their continuing enforcement of the challenged determinations, with federal law," the carriers met the requirements for application of the exception. *Id.* at 47a. The court also held that *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), did not preclude the carriers' *Ex parte Young* suit against the Commissioners. The court pointed out that "[s]ection 252 of the Act does not create a 'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." Pet. App. 48a. Unlike the judicial enforcement scheme in the Indian Gaming Regulatory Act, the court remarked, Congress in section 252(e)(6) of the Act did not limit a federal court's remedial powers. *Id.* at 50a-51a.

D. Subsequent Events

After the Seventh Circuit issued its mandate, the parties returned to the district court. On October 10, 2000, MCI and Ameritech Illinois moved in the district court to voluntarily dismiss all of their claims. On October 13, 2000, the district court granted their motion and dismissed the case. On October 23, 2000, the ICC moved the Seventh Circuit to recall its mandate and vacate its judgment. The motion is pending.

REASONS FOR GRANTING THE WRIT

The 1996 Act is a major piece of federal legislation that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth

tens of billions of dollars." *Iowa Utilities*, 119 S. Ct. at 726, 738. The Act's goals of fostering competition in the local markets, and furthering competition in the long-distance market, aim to bring lower prices, better quality service and technological innovations to all telephone subscribers. To implement its provisions, the Act enlists the states and the FCC in a cooperative effort. Thus, the issues implicated by the Act are of substantial local and national importance.

The Court already accepted two cases involving the 1996 Act. In the first, *Iowa Utilities*, the Court resolved a jurisdictional dispute over the division of authority between state commissions and the FCC in implementing certain portions of the local competition provisions (*i.e.*, sections 251 and 252) of the Act. The Court generally upheld the FCC's rulemaking authority to adopt rules to guide the states in performing their responsibilities under the Act. The Court also reaffirmed that the substantive jurisdictional division of authority between the states and the FCC set forth in 47 U.S.C. § 152(b) continues to operate in the absence of specific contrary provisions. *Iowa Utilities*, 119 S. Ct. at 731 n.8. In addition, earlier this year, the Court granted certiorari in *Texas Office of Public Utility Counsel v. Federal Communications Comm'n*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3747 (June 5, 2000) (No. 99-1244), a case involving review of the FCC's efforts to implement the universal service provisions of the Act.

This case, like the other two, implicates the Act--specifically section 252(e)(6), the judicial review provision. In fact, this case and the *Iowa Utilities* case are bookends: one involves the beginning of the implementation process, the other its conclusion. In *Iowa Utilities*, as mentioned

above, the issue was jurisdiction: who had primary authority, the state commissions or the FCC, to implement sections 251 and 252 of the Act. In this case, and the other cases brought against states under section 252(e)(6), the issue is whether states must be made parties to suits for review of their determinations made under section 252, and if so, whether the Eleventh Amendment stands as a bar to such review in federal court.

The importance of constitutional sovereign immunity to the States cannot be doubted. The Seventh Circuit's constructive waiver holding conflicts with this Court's recent decision in *College Savings*. In addition, as the Seventh Circuit acknowledged, its constructive waiver holding conflicts with the Sixth Circuit's view in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Furthermore, the court's *Ex parte Young* holding was erroneous and impermissibly enlarges the narrow, judicially-created exception in derogation of Illinois' constitutional sovereign immunity.

Many states have raised the Eleventh Amendment as a bar to suits brought against them under section 252(e)(6) of the Act. *E.g.*, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Serv., Inc.*, 97 F. Supp.2d 1263, 1374 (N.D. Ga. 2000); *AT&T Comm. of South Cent. States v. BellSouth Telecommunications, Inc.*, 43 F. Supp.2d 593 (M.D. La. 1999). Whether states (or state officials) may be sued in federal court under the Act is an important federal and constitutional question that this Court should settle. Given the importance of the Act and its substantial impact on the Nation's economy and given the importance of

constitutional sovereign immunity to the states, the Court should grant review.

I. The Decision Below Is Contrary to *College Savings*, Supreme Court Precedent and the Constitution.

A. Congress Cannot Use Its Commerce Power to Condition a State's Regulatory Responsibilities in the Act on Waiver of the State's Sovereign Immunity.

Twice the ICC and its Commissioners argued to the court of appeals that Congress may not use its *commerce power* to condition state participation in the federal scheme on a state's waiver of its constitutional sovereign immunity and twice the court recharacterized and misstated their argument. Pet. App. 33a ("The commissions in our cases argue that the Court's decision in *College Savings* has eliminated *all* so-called 'constructive' or 'implied waivers.' ") (emphasis added); *id.* at 34a; *see* ICC Petition for Rehearing in 98-2127, at 1-2. The court's holding that Congress may use its commerce power to condition Illinois' participation in the Act on waiver of its sovereign immunity conflicts with this Court's commerce clause jurisprudence and the Constitution.

It is a basic principle of federalism that the Constitution creates a federal government of enumerated powers, and that those powers are defined and limited. The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8 cl. 3; *United States v. Lopez*, 514 U.S. 549, 552-53 (1995). This Court has identified three broad categories of activity Congress may regulate under the

Commerce Clause: 1) Congress may regulate the use of the channels of interstate commerce; 2) Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and 3) Congress may regulate those activities that substantially affect interstate commerce. *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000).

Congress may not, however, "regulate" state sovereign immunity under the Commerce Clause. A state's sovereign immunity is not a commercial or economic activity. The states' immunity from suit is a fundamental aspect of sovereignty, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. at 2230; *Alden*, 119 S. Ct. at 2246, 2254. Nor can the ICC's role in the Act--arbitrating and approving agreements--be understood as a commercial activity. *See, e.g., New Orleans Pub. Serv. v. New Orleans, Inc.*, 491 U.S. 350, 361 (1989) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."). The states' conduct in *Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964), (owning and operating a railroad) and *College Savings* (marketing and administering a tuition prepayment program) was commercial activity. *College Savings*, 119 S. Ct. at 2224, 2226. Because it was, Congress could regulate it under its commerce power. Here, however, the ICC is tasked under the Act to mediate disputes, arbitrate open issues, and approve interconnection agreements; and in fulfilling these noncommercial, regulatory obligations, waiver of immunity is simply not an issue. In fact, the prospect of Congress conditioning the

ICC's ability to do so on waiver of Illinois' sovereign immunity would exceed Congress' power under the Commerce Clause and, therefore, violate the Constitution.

Congress may, however, use its spending power to achieve an objective that it could not achieve directly under its other Article I powers. For example, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court indicated that conditioning participation in a federally funded program on a state's consent to waive its immunity was a permissible use of Congress' spending power. *Id.* at 247; *College Savings*, 119 S. Ct. at 2227 n.2 ("[C]onditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful *commercial* activities.") (emphasis added). Congress, however, did not enact the Act pursuant to the Spending Clause; the Act was enacted under the Commerce Clause. Therefore, the spending power waiver analysis under *Atascadero* is inapplicable.

A purported "invitation" for states to waive their constitutional sovereign immunity as a condition for participating as a regulator in the federal scheme lies outside of Congress' power to regulate commerce under the Commerce Clause. The court of appeals failed to appreciate the constitutional limitations on Congress' commerce power and the commercial activity underlying the *Parden* and *College Savings* decisions. Although Congress may have the power under the Commerce Clause to preempt the states from regulating intrastate telecommunications (or allow the states to continue to regulate), it does not have the power *under the Commerce Clause* to demand, as a condition for

state participation in the federal scheme, a waiver of the state's immunity. *See* Pet. App. 40a. Thus if, as the court of appeals held, Congress conditioned participation under the Act on waiver of sovereign immunity, then Congress exceeded its commerce power, and section 252(e)(6) is unconstitutional.

B. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings* and Conflicts With the Sixth Circuit's Decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

In *College Savings*, the Court expressly overruled *Parden v. Terminal Ry. Co. of Alabama Docks Dep't*, 377 U.S. 184 (1964), and repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the state itself. *College Savings*, 119 S. Ct. at 2228. *College Savings* confirms that a state's waiver must be a deliberate, express waiver made by the state itself and, like federal sovereign immunity waivers, cannot be implied. *Id.* at 2228-29. In this case, no party claimed nor could it, that Illinois or the ICC expressly waived the state's immunity from suit in federal court. Pet. App. 38a. Thus, after *College Savings*, this express waiver inquiry is dispositive and Illinois cannot be found to have waived its immunity from suit.

Despite the clear command of *College Savings*, the Seventh Circuit formulated a new constructive waiver rule, one that in effect revived *Parden* and implied waiver under the Commerce Clause. The court relied on two cases, *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)

and *South Dakota v. Dole*, 483 U.S. 203 (1987), that this Court distinguished as "fundamentally different" from commerce power cases. *College Savings*, 119 S. Ct. at 2231. Most obvious, *Petty* and *Dole* involved the Compact Clause and Spending Clause, respectively, whereas, this case involves legislation under the Commerce Clause.

In *College Savings*, this Court found *Petty* distinguishable because under the Compact Clause "States *cannot* form an interstate compact without first obtaining the express consent of Congress." *College Savings*, 119 S. Ct. at 2231. In contrast, under the Act, state commissions are not required to apply to Congress for approval or otherwise obtain the "consent" (express or implied) of Congress before performing their responsibilities. The Court also found *Dole* and other spending power cases distinguishable from commerce power cases because in exercising its spending power, Congress may "condition its grant of federal funds to the states upon their taking certain action Congress could not require them to take, and their acceptance of the funds entails an agreement to the actions." *Id.* The Court considered funds disbursed under the spending power to be gifts to states. *Id.*

In this case, however, Congress enacted the Act under the Commerce Clause, not the Spending Clause, and states do not receive federal funds for performing their responsibilities under the Act. As a consequence, state commissions do not need to apply to Congress to perform their responsibilities or to agree to specific conditions, which might include a waiver of immunity, in exchange for federal funds. In fact, that the FCC must expressly preempt a state's jurisdiction under § 252(e)(5) if the state fails to timely perform its responsibilities (or perform them at all) confirms that states

have jurisdiction over such matters to begin with and, therefore, do not have to apply to Congress or agree to specific conditions to obtain such jurisdiction.

The common thread uniting *Petty* and *Dole*, as the *College Savings* Court implicitly recognized, is the contractual basis for the waiver in each case. In *Petty*, the bistate commission created pursuant to an interstate compact was found to have consented to suit in federal court by reason of a suability provision attached to the congressional approval of the contract. *College Savings*, 119 S. Ct. at 2231; *Petty*, 359 U.S. at 789. Similarly, in *Dole* and other spending power cases, when Congress legislated under the Spending Clause, it in effect offered to form a contract with potential recipients of funding: in return for federal funds, states agreed to comply with federally imposed conditions. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Here, of course, no such "contract" arises when Congress legislates under the Commerce Clause.

Besides misconceiving *College Savings*, the Seventh Circuit misunderstood the nature of the Act and its effect on the existing federal-state regulatory model. In the court's view, states play the role of a "'deputized' federal regulator," "regulating on behalf of Congress," and their sole authority with respect to agreements is "derived from provisions of the Act and not from their own sovereign immunity." Pet. App. 41a-42a. Congress has preempted state jurisdiction over local telephone service, so the theory goes, and then given portions of it back to the states with conditions attached. Thus, according to the court, regulating local telephone service "is no longer an " 'otherwise permissible activity' "

for the states. Pet. App. 44a (quoting *College Savings*, 119 S. Ct. at 2231).

The court's view is belied by the plain language, structure and purpose of the Act, ignores § 601(c) of the Act prohibiting implied preemption of state law, and is contrary to the dual federal-state regulatory model preserved by the Act. *Iowa Utilities*, 119 S. Ct. at 731 n.8. The Act does not preempt state jurisdiction over local telephone service *in toto*, but rather specifically *preserves* it, where authority is not explicitly given to the FCC. 47 U.S.C. § 152(b); *see id.* §§ 251(d)(3), 252(e)(3), 261(b), (c); *cf.* 47 U.S.C. § 276(c) (expressly preempting state regulations inconsistent with federal law), 251(e)(1) (granting exclusive authority to FCC over numbering administration). Historically, states have been the regulators of local telephone service and they continue to perform that role after the Act. 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). In the Act, Congress preserved state preeminence over local telephone matters, where not expressly given to the FCC. 47 U.S.C. § 152(b); *Iowa Utilities*, 119 S. Ct. at 731 n.8 (1999). Moreover, section 601(c)(1) adopts a rule of statutory construction expressly prohibiting implied preemption of state law. What's more, as mentioned above, that the FCC must expressly preempt a state's jurisdiction under section 252(e)(5) confirms that states have jurisdiction over such matters in the first place.

Furthermore, the Seventh Circuit's view of the Act and the court's "give-back theory" are inconsistent with this Court's view of the Act in general and section 152(b) (a section unchanged by the 1996 amendment) in particular. In *Iowa Utilities*, the Court observed that the Act extends federal

authority into local matters formerly within the states' exclusive control. And, although the Court views the Act as expressly preempting the states' jurisdiction over certain matters, it does not view the Act as preempting state jurisdiction wholesale and offering to return portions of it to the states. *Iowa Utilities*, 119 S. Ct. at 731 n.8; *see* Pet. App. 44a.

In the court's view, by authorizing the ICC to regulate telecommunication in Illinois—regulatory authority the ICC has exercised since at least 1913, *see City of Edwardsville v. Illinois Bell Tel. Co.*, 310 Ill. 618, 619 (1924)--and then by failing to "forbid" the ICC from exercising that authority after passage of the 1996 Act, Illinois "agreed unmistakably and affirmatively" to waive its sovereign immunity. Pet. App. 43a n.10. But this view is a reprise of *Parden* cloaked in different language. This Court has rejected *Parden* and implied waivers under the Commerce Clause. The Seventh Circuit's opinion finding that Illinois constructively waived its sovereign immunity by carrying out its responsibilities under the Act is contrary to *College Savings*.

In addition, the Seventh Circuit expressly acknowledged that its constructive waiver holding conflicted with the Sixth Circuit's opinion in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Pet. App. 45a n.12. In *GTE*, the Sixth Circuit stated that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE*, 209 F.3d at 922 n.6. The Sixth Circuit believed *College Savings*' command so clear that it was unnecessary for the court to undertake an extended constructive waiver analysis. Thus, given that the

Seventh Circuit's constructive waiver holding conflicts with *College Savings* and *GTE*, the Court should grant review.

C. The Act Does Not Inform States With the Clarity Required by This Court that Performing the Regulatory Responsibilities Given to Them Will Result in Waiver of Their Sovereign Immunity.

Even assuming for the sake of argument the validity of constructive waiver under the Commerce Clause, and further assuming Congress intended to condition participation on waiver, it did not express that intent with the clarity required by this Court. In discussing the clarity necessary for waiver of sovereign immunity, the Court in *United States v. Nordic Village*, 503 U.S. 30 (1992) stated that Congress has not expressed its intent for waiver in unmistakably clear language where "plausible" alternative readings of a statute are possible. *Id.* at 34-35, 37; *Lane v. Pena*, 518 U.S. 187, 199-200 (1996); *see College Savings*, 119 S. Ct. at 2229 (harmonizing the rules for federal sovereign immunity with state sovereign immunity).

Congress created a mechanism for review in section 252(e)(6) that excludes states as parties and that provides for review of the agreements themselves. Judge Crabb in the Wisconsin companion cases proposed the same reading of section 252. *Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F.Supp2d 710, 717-18 (W.D. Wis. 1999), *rev'd sub nom. MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000). In response, the Seventh Circuit merely determined that it "cannot accept" the ICC's reading of the statute. Pet. App. 28a. What the court failed to do, however, as required by *Nordic Village*, is

explain why the ICC's reading of the Act was implausible. In fact, the ICC not only offered a plausible reading, but the sole reading of the statute that hews to Congress' intent and the plain language of the statute, observes principles of federalism, respects states' sovereignty, and is constitutional.

In any case, under the waiver analysis whether the court's reading of the statute is better than the ICC's is not relevant. What is relevant is whether the Act is susceptible to alternative readings. If the Act is, the requisite clarity is missing and there can be no waiver of immunity under *Nordic Village*. Given the ICC's and Judge Crabb's plain reading of the statute and this Court's description of the Act as "in many important respects a model of ambiguity or indeed even self-contradiction," the court of appeals erred in concluding that the Act is not susceptible to alternative readings. *Iowa Utilities*, 119 S. Ct. at 738.

II. The Decision Below Conflicts With *Ex Parte Young*, 209 U.S. 123 (1908).

A. The Lower Court Erred in Determining Congress Intended for *Ex parte Young* Actions to Be Brought Under the Act Against Individual State Commissioners.

The Act does not authorize actions against individual state officials. Under the Court's decision in *Seminole Tribe*, the inquiry is whether Congress intended to authorize *Ex parte Young* actions. *Seminole Tribe*, 517 U.S. at 75 n.17. If Congress did not intend to authorize suits against state officials as individuals, then the *Ex parte Young* exception is unavailable. The Act refers only to state commissions, not

commissioners of state commissions. More particularly, section 252(e)(6), the articulated basis for federal jurisdiction, refers only to state commissions. In this case, the court of appeals impermissibly assumed Congress authorized an *Ex parte Young* action because Congress did not expressly preclude it. *See* Pet. App. 51a (noting that "the IDEA did not contain an explicit remedial scheme that would prevent an *Ex parte Young* suit.") (internal quotations omitted). The purpose and structure of the Act, and the plain language in section 252(e)(6), make clear that Congress did not intend for review of state commission determinations made under section 252 to be accomplished through *Ex parte Young* actions against the commissioners themselves. It would be anomalous if Congress had intended to expose state commissioners "to the full panoply of a federal court's remedial powers, including, presumably, contempt sanctions," when the same actions, if performed by the FCC under section 252(e)(5) in lieu of state commissions, would be subject only to administrative review under 47 U.S.C. § 402. *Seminole Tribe*, 514 U.S. at 75.

The court of appeals also failed to reconcile its reading of the Act to require review of administrative agency actions—whether state commission or FCC—with a suit against the individual commissioners under an *Ex parte Young* theory. *See* Pet. App. 37a. The court construed section 252(e)(6) to require that state commissions be made parties to suits reviewing their actions "just as the FCC is a party to suits seeking review of its actions." *Id.* at 28a. Thus, in the court's view, section 252(e)(6) provides for judicial review of regulatory actions made by an administrative agency, whether federal or state. Under federal law, the FCC is

named as a party to appeals from its orders. *Ingalls Shipbuilding v. Director, OWCP*, 117 S. Ct. 796, 806-07 (1997); *see* Fed. R. App. P. 15(a) (requiring that agency be named respondent in review of its orders). Under the Act, if the FCC preempts a state commission's jurisdiction under section 252(e)(5), assumes responsibility for a proceeding, and acts for the state commission, the FCC's actions are subject to judicial review. There is no indication in section 252(e)(6) that an aggrieved party may sue the FCC commissioners individually or that it may seek declaratory, injunctive, or relief other than administrative review of the FCC's actions. Similarly, under Illinois law the ICC is named as a party to appeal of its orders, 220 ILCS 5/10-201; 155 Ill.2d R.335(a), and there is no indication in section 252(e)(6) that an aggrieved party may sue a commissioner of a state commission or that it may seek declaratory, injunctive, or relief other than administrative review of a state commission's determinations made under section 252. The court's reading of the review provided in the Act is simply incompatible with an action based on an *Ex parte Young* theory.

Furthermore, in simply comparing the types of remedies courts may prescribe rather than in considering to whom Congress intended the remedies to apply, the court failed to appreciate the larger principle reconfirmed in *Seminole Tribe*, that where Congress creates a remedial scheme for the enforcement of a particular federal right, the courts should not supplement that remedial scheme with additional remedies. Section 252 establishes a limited remedial scheme for review of state commission determinations made in approving or rejecting agreements that does not include suits

against individual state commissioners to otherwise accomplish review of those state commission determinations. The court of appeals rewrote the statutory scheme, rendered superfluous the limited statutory remedy provided under section 252(e)(6) and permitted the carriers to obtain relief against the individual commissioners that the carriers could not otherwise obtain under section 252(e)(6). As a consequence, the court's opinion allowing *Ex parte Young* actions under the Act was improper and contrary to this Court's precedent.

B. The Court of Appeals Erred in Finding the *Ex Parte Young* Exception Applicable Because the Exception Applies Only to Ongoing Constitutional Violations by State Officials.

The basis of the *Ex parte Young* doctrine is that when a state officer acts in violation of the Constitution, he cannot claim to be acting on behalf of the state for purposes of the Eleventh Amendment and, therefore, an action against him is not a suit against a state barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 102 (1984) ("*Pennhurst II*"). To the ICC's knowledge, in the time since *Ex parte Young* was decided, this Court has not expanded the narrow *Ex parte Young* exception beyond alleged constitutional violations. This is not surprising since the Court has repeatedly instructed that the *Ex parte Young* exception is a narrow exception, not to be given an expansive interpretation. *E.g.*, *Pennhurst II*, 465 U.S. at 102.

The ICC argued below that the *Ex Parte Young* exception is inapplicable to the carriers' claims under the Act because

the carriers failed to allege that the individual commissioners violated the Constitution, whether by virtue of the Supremacy Clause[3] or more familiar constitutional provisions. The court of appeals, however, mistakenly believed that allegations of federal statutory violations alone are sufficient to invoke the *Ex parte Young* exception and lift a state's sovereign immunity. Pet. App. 46a; *see id.* at 95a-96a. The court further erred in finding the exception applicable to instances where, as here, state officials are authorized by federal law to interpret and apply federal law in arbitrating and approving agreements under the Act. Under the court's view of the *Ex parte Young* doctrine, each commissioner would be "stripped of his official or representative character and [would be] subjected in his person to the consequences of his individual conduct" for interpreting and applying federal law but reaching a result determined later to be incorrect. *Ex parte Young*, 209 U.S. at 159-60. The court's decision is contrary to long-standing precedent of this Court limiting application of the *Ex parte Young* exception to alleged constitutional violations and, if there were any doubt, the Court's recent sovereign immunity cases resolve it.

This Court's sovereign immunity decisions last Term confirm that the *Ex parte Young* exception applies only to ongoing constitutional violations by state officials. In *College Savings* and *Alden*, the Court reaffirmed that state

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3 Importantly, the Supremacy Clause is not a source of federal rights; rather it secures federal rights by according them priority when they come into conflict with state law. *Golden State Transit v. Los Angeles*, 493 U.S. 103, 107 (1989).

sovereign immunity is *constitutional*, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. 2230; *Alden*, 119 S. Ct. at 2254. The Court also reaffirmed that the principle of state immunity embodied in the Eleventh Amendment is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Alden*, 119 S. Ct. at 2266. The *Ex parte Young* doctrine, however, is a judicially-created narrow exception to the Eleventh Amendment. It represents an attempt by the Supreme Court to "harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst II*, 465 U.S. at 105.

As *Alden* confirms, the *Ex parte Young* exception to the Eleventh Amendment is necessary to ensure the *Constitution* "remains the supreme law of the land." *Alden*, 119 S. Ct. at 2263. Thus, although state sovereign immunity is constitutional, the Court has determined that such immunity must yield in certain cases to protect other rights and privileges secured by the Constitution. Consequently, *Ex parte Young* requires a constitutional predicate for its application. In fact, given the constitutional origins of sovereign immunity and its limits on congressional power under Article I and federal judicial power under Article III, there would appear to be little difference between Congress using its Article I powers to abrogate a state's Eleventh Amendment immunity (an action found to be without constitutional authority in *Seminole Tribe*) and a federal court using *Ex parte Young* to accomplish the same result by allowing private suits alleging nonconstitutional, federal

statutory violations by state officials. In each case, the *constitutional* justification for such action is lacking.

Here, Congress had no constitutional authority to subject Illinois to private suits in federal court under the Act, an exercise of Congress' commerce power. The ICC's arbitration of disputed issues between MCI and Ameritech Illinois and approval of their interconnection agreement did not challenge the supremacy of the Constitution or violate any right protected by the Constitution.[4] *See Alden*, 119 S. Ct. at 2263. Unlike a typical *Ex parte Young* action brought to enjoin a state official's enforcement of a state law alleged to conflict with federal law, in this case MCI and Ameritech Illinois claimed the ICC erred in resolving the disputed issues and approving their interconnection agreement—actions federal law specifically authorizes the ICC to take. *See Papasan v. Allain*, 478 U.S. 266, 277 (1986) ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.").

In substance, the carriers simply complained that in applying federal law to the evidence before it, the ICC "got it wrong." However, an incorrect decision by state officers acting in their official capacities and empowered to do so is

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4 The discussion in this section does not apply to Count V of MCI's complaint, which alleged a constitutional violation under the Due Process Clause of the Fourteenth Amendment. Because the allegations in Count V were based on past conduct by the Commissioner, however, that count failed to come within the *Ex parte Young* exception for the reasons discussed in section II.C.

insufficient to override a state's sovereign immunity. As the Court stated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949):

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. We therefore reject the contention here.

Id. at 695 (citation omitted); *see Pennhurst II*, 465 U.S. at 113 n.22 ("*Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it."). Accordingly, the court erred in finding that the individual commissioners could be sued in an *Ex parte Young* action when the carriers failed to allege any violation of the Constitution.

C. The Court of Appeals Erred in Finding that the ICC's Arbitration Decision Incorporated into the Carriers' Agreement Is an Ongoing Violation.

The court of appeals found that the carriers' claims alleged ongoing violations and requested prospective relief and, therefore, came within the *Ex parte Young* exception. Pet. App. 46a-47a. Specifically, in the court's view, since the ICC's arbitration determinations "are still in place" and the carriers were seeking an injunction to "conform the [individual commissioners'] future actions, including their continuing enforcement of the challenged determinations, with federal law," the carriers met the requirements for application of the exception. *Id.* at 47a. In other words, in the court's view, the agreement itself created the ongoing violation.

The court's analysis and holding was contrary to the decisions of the Court. In *Edelman v. Jordan,* 415 U.S. 651 (1974), the Court expressly confined the *Ex parte Young* exception to suits requesting prospective injunctive relief to prevent future violations of federal law. *Id.* at 655. "Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past..." *Papasan*, 478 U.S. at 277-78. The focus of the *Ex parte Young* inquiry is on the *actions of the state officials*, and the relevant inquiry is whether prospective relief could prevent an ongoing violation of federal law by *state officials*. *Pennhurst II*, 465 U.S. at 102-03; *Lett v. Magnant*, 965 F.2d 251, 255 (7th Cir. 1992). No party in this case claimed that the commissioners themselves were violating federal law when

the claims were filed, let alone that they were continuing to violate federal law afterwards. The arbitration is over with respect to the issues complained of and will not recur.

The carriers sought a declaration that the ICC violated the law in the past, relief not within the narrow *Ex parte Young* exception. That the ICC's arbitration determinations are still in place does not transform that past decision into a present, ongoing violation by the Commissioners. Nor does the request to conform the Commissioners' future actions—actions that are necessarily hypothetical and speculative, not threatened or imminent--with federal law constitute an ongoing violation, much less satisfy the requirements for an injunction. The carriers did not allege that the Commissioners enforced or threatened to enforce the specific terms of the interconnection agreement that are alleged to violate federal law. The arbitration that helped finalize MCI's and Ameritech Illinois' interconnection agreement is completed with respect to the issues complained of and will not recur, so there is no future conduct by the ICC for a court to remedy. At bottom, the carriers sought relief from a past ICC arbitration decision that they incorporated into their agreement, but the agreement itself does not constitute the ongoing violation for purposes of *Ex parte Young*. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir.), *aff'd sub nom. Breard v. Greene*, 118 S. Ct. 1352 (1998).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 6, 2000

APPENDIX A – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JULY 24, 2000

UNITES STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2127

MCI TELECOMMUNICATIONS CORPORATION and MCI METROACCESS TRANSMISSION SERVICES, INCORPORATED,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION.

Intervenors -Appellees,

v.

ILLINOIS BELL TELEPHONE COMPANY, doing business as Ameritech Illinois, Incorporated,

Defendant-Appellee,

ILLINOIS COMMERCE COMMISSION, TERRY HARVILL, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the Illinois Commerce Commission and not as individuals, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2225 – **David H. Coar**, *Judge*

Argued November 6, 1998 – Reargued December 2, 1999
Decided July 24, 2000

No. 99-2805

WISCONSIN BELL, INCORPORATED, doing business as Ameritech Wisconsin,

Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, in her official capacity as a member of the Commission, DANIEL J. EASTMAN, in his official capacity a member of the Commission, et al.,

Defendants-Appellees.

No. 99-2806

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, and JOSEPH P. METTNER, Commissioners of the Public Service Commission of Wisconsin,

Defendants-Appellees.

No. 99-2811

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,

Defendants-Appellees.

No. 99-2873

MCI METRO ACCESS TRANSMISSION SERVICES, INCORPORATED, and MCI TELECOMMUNICATIONS CORPORATION,

Plaintiffs-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, in their official capacities as members of the Commission, et al.,

Defendants-Appellees.

No. 99-2992

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor-Appellant.

Appeals from the United States District Court
for the Western District of Wisconsin.
Nos. 97 C 566; 98 C 11; 98 C 153;
98 C 366—**Barbara B Crabb**, *Judge*

December 2, 1999, Argued
July 24, 2000, Decided

Before RIPPLE, KANNE and DIANE P. WOOD, *Circuit Judges*.

RIPPLE, *Circuit Judge*.

These consolidated appeals challenge determinations made by state regulatory commissions exercising their authority under the Telecommunications Act of 1996 ("the 1996 Telecommunications Act" or "the Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code). We must decide whether private carriers may sue state commissions and their commissioners in federal court for alleged violations of §§ 251 and 252 of the Act. These sections set forth the proc-

ess by which Congress sought to bring competition to local telephone exchange markets through interconnection agreements between incumbent and new carriers. *See* 47 U.S.C. §§ 251 & 252 (Supp. II 1996).

One of the consolidated cases, 98-2127, is before us on rehearing. In this case, Illinois Bell, Inc. (doing business as Ameritech Illinois) ("Ameritech Illinois") and MCI Telecommunications and MCI Metro Access Transmission Services, Inc. (collectively "MCI") claim that the Illinois Commerce Commission ("the ICC") and various individual Commissioners ("the ICC Commissioners") violated the Act with respect to the ICC's arbitration and approval of the carriers' interconnection agreement. The ICC and the ICC Commissioners filed motions to dismiss on Eleventh Amendment immunity grounds. The district court denied those motions, *see MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, No. 97 C 2225, 1998 WL 156678 (N.D. Ill. 1998), and the ICC and the ICC Commissioners have appealed.

We affirmed the district court's judgment in a previous opinion. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). Thereafter, however, the Supreme Court issued a trio of opinions addressing the scope of Eleventh Amendment immunity. *See Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 144 L. Ed. 2d 605, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999). We therefore granted rehearing, restored 98-2127 to

our calendar for oral argument, and requested that the parties file supplemental briefs addressing the impact of the Supreme Court's decisions on this case. See 183 F.3d at 567 (7th Cir. 1999).

The other cases, all from Wisconsin, are before us for the first time. Although aligned in various ways, the parties involved in the disputes include Wisconsin Bell, Inc. (doing business as Ameritech Wisconsin) ("Ameritech Wisconsin"), MCI,[1] the Public Service Commission of Wisconsin ("the PSCW") and various members of that commission ("the PSCW Commissioners"). In each case, the PSCW or the PSCW Commissioners or both were named as defendants, and they filed motions to dismiss the lawsuits against them on Eleventh Amendment grounds. The district court granted the motions, *see Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 57 F. Supp. 2d 710 (W.D. Wis. 1999), and the carriers now appeal the district court's judgment.

For the reasons that follow, we hold that the Eleventh Amendment does not bar these suits against the state commissions and their commissioners because, in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act. We also hold, as an independent basis for decision, that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine.

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1 Again, both MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc.

I. BACKGROUND

A. The Statutory Scheme

Congress enacted the 1996 Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructures local telephone markets" by transforming the "long-standing regime of state-sanctioned monopolies" into a competitive market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent local exchange carriers ("LECs") to share their networks with competitors. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers. *See* 47 U.S.C. § 251 (Supp. II 1996).

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party

may ask the appropriate state commission to participate as a mediator in the negotiations. See *id.* § 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition the state commission to arbitrate any open issues. *See id.* § 252(b)(1). Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by Federal Communications Commission ("FCC") regulations issued pursuant to § 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Specifically, state commissions may reject negotiated interconnection agreements only if the commission finds (1) that the agreement discriminates against a carrier that is not a party to the agreement or (2) that implementation of the agreement (or a part thereof) would be inconsistent with "the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). A state commission may reject an arbitrated interconnection agreement only if the agreement (or part thereof) (1) does not meet the requirements of § 251 and its implementing regulations or (2) fails to meet the pricing standards set forth in subsection 252(d). *See id.* § 252(e)(2)(B).

Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under § 252, then the FCC must assume responsibility for the pro-

ceeding and act for the state commission in carrying out its functions. An implementing regulation to § 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)--thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. § 51.801(b). A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* § 51.801(c). In such a case, the agreement will be deemed approved. *See* 47 U.S.C. § 252(e)(4) (Supp. II 1996).

Therefore, subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place. Only one scenario, not present in our cases, appears to be a variation to this scheme: when the parties reach a voluntarily negotiated agreement without any request for mediation or arbitration and the state commission fails to act to approve or reject the agreement. When these two circumstances occur, the resulting agreement will be deemed approved by the state commission, *see id.* § 252(e)(4); the FCC will not step in to assume the approval function.

The Act provides that federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements. In subsection 252(e)(4), Congress expressly eliminated state court jurisdiction to review actions of state commissions in approving or

rejecting agreements under § 252. Moreover, subsection 252(e)(6), titled "Review of State commission actions," provides that, whenever a state commission fails to act, the exclusive remedies for that failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. Subsection 252(e)(6) also provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]."

On a separate but related note, Congress also has opened up long distance service competition. The Act allows Bell operating companies[2] ("BOCs"), such as Ameritech Illinois or Ameritech Wisconsin in our cases, to provide long distance service to their customers--a service generally off limits to BOCs under the pre-1996 Telecommunications Act regime--once certain conditions have been met. Section 271 of the Act allows BOCs to provide "out-of-region" long distance service. *See id.* § 271(b)(2). For a BOC to provide "in-region" long distance service, however, the BOC must obtain FCC approval. *See id.* § 271(b)(1). To obtain FCC approval, the BOC must satisfy numerous requirements, one of which is to show that the BOC has opened up its local network to interconnection with new competitors. *See id.* § 271(c). A

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2 A "Bell operating company" is one of the local "Baby Bells" split off from AT&T in the divestiture decree. See Peter W. Huber *et al.*, Federal Telecommunications Law 1362 (2d ed. 1999); see also 47 U.S.C. § 153(4) (Supp. II 1996) (listing the individual Bell operating companies).

BOC may make this showing either by entering into interconnection agreements with "one or more unaffiliated competing providers of telephone exchange service," *id.* § 271(c)(1)(A), or, if no new entrants have requested interconnection with the BOC, by showing that the appropriate state commission has approved "a statement of the terms and conditions that the [BOC] generally offers to provide such access and interconnection," *id.* § 271(c)(1)(B). These two "methods" of obtaining FCC approval are commonly known as "Track A" and "Track B." *See generally SBC Communications Inc. v. F.C.C.*, 138 F.3d 410, 413-21 (D.C. Cir. 1998) (discussing the tracks by which BOCs may obtain FCC approval under § 271 to provide in-region long distance services).

For a BOC seeking to obtain FCC approval using the Track B approach, subsection 271(c)(1)(B) requires the BOC to file with the appropriate state commission a statement of generally available terms and conditions (a "SGAT") and to obtain approval of the SGAT as provided by subsection 252(f). The SGAT sets forth the terms and conditions the company intends to offer new entrants seeking interconnection and access to the BOC's network. Once a BOC has filed a SGAT with a state commission, that commission has 60 days within which to complete a review of it, *see* 47 U.S.C. § 252(f)(3)(A) (Supp. II 1996), or to permit the statement to take effect, *see id.* § 252(f)(3)(B). According to subsection 252(f)(2), a state commission may not approve an SGAT unless the SGAT complies with subsection 252(d) and § 251 and the FCC regulations thereunder. The Act also allows state commissions to establish and enforce state law requirements in their review of an SGAT, but the commissions

may do so only if those standards do not conflict with the Act. *See id.* § 252(f)(2). Even after an SGAT has been allowed to take effect under subsection 252(f)(3)(B), however, the state commission may continue to review such an SGAT and may approve or disapprove it under subsection 252(f)(2) at any time. *See id.* § 252(f)(4). As with the interconnection process, if a state commission fails to act and the FCC has been made aware of that failure to act, the FCC must assume responsibility for the SGAT and act in place of the state commission within 90 days. *See id.* § 252(e)(5). Similarly, the judicial review provision in subsection 252(e)(6) also applies to state commission determinations regarding SGATs.

B. The Illinois Litigation

1. The Lawsuit

Appeal 98-2127 began as a lawsuit over an interconnection agreement between Ameritech Illinois and MCI. After negotiations failed to produce an interconnection agreement between the two companies, MCI petitioned the ICC, in accordance with subsection 252(b)(1) of the Act to arbitrate the unresolved issues. The ICC held arbitration hearings and eventually approved a final interconnection agreement for the two companies. MCI then filed suit against Ameritech Illinois, the ICC, and various individual ICC Commissioners in their official capacities. MCI alleged that the ICC had violated certain sections of the Act when conducting the arbitration proceedings and approving the terms of the interconnection agreement. Ameritech Illinois filed a cross-claim against MCI, the ICC, and the ICC Commissioners in their official capacities, asserting that one aspect of the ap-

proved interconnection agreement was contrary to the Act. In their complaints, both MCI and Ameritech Illinois sought declaratory and other equitable relief.[3]

2. The Motions to Dismiss

The ICC and the ICC Commissioners moved to dismiss the claims against them on Eleventh Amendment sovereign immunity grounds. The ICC and the ICC Commissioners argued to the district court that the Act could not abrogate Illinois' immunity. They pointed out that Illinois had not explicitly authorized waiver of its immunity through any statute or constitutional provision. They further contended that their participation in the arbitration and review process under the Act did not constitute waiver of sovereign immunity because no provision of the Act required the state to submit to suit as a condition for exercising the authority granted it.

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3 Ameritech Illinois also filed a separate action against the ICC Commissioners, challenging their approval of two negotiated interconnection agreements between Ameritech Illinois and other telecommunications carriers. An appeal in that case, 98-2256, originally was part of this appeal. The agreements at issue in 98-2256 were made through private negotiations without mediation or arbitration by the ICC. During the pendency of the appeal in 98-2256, however, Ameritech Illinois filed a motion requesting that we remand 98-2256 to the district court so that it may be dismissed voluntarily with prejudice. We have granted that motion and therefore need not address the applicability of the Eleventh Amendment to litigation involving such privately negotiated agreements. We also have remanded to the district court a different case, 98-2566, which was originally part of this consolidated appeal, so that it too may be dismissed voluntarily.

Ameritech Illinois and MCI replied that Congress had conditioned state commissions' participation in the arbitration and approval process on their submission to federal court jurisdiction. Thus, they argued, the ICC and the ICC Commissioners waived any Eleventh Amendment immunity when they elected to implement the federal regulatory scheme set forth in the Act with full knowledge that their determinations would be reviewable exclusively in federal court.

In reply, the ICC and the ICC Commissioners reemphasized that the Act contains no specific language expressly conditioning state commission participation in the regulatory process on consent to suit in federal court. Rather, they contended, the Act provides only for federal court review of the agreements themselves.

3. Decision of the District Court

The district court denied the motions to dismiss. The district court determined that the ICC defendants constructively had waived their Eleventh Amendment immunity and, in the alternative, that there was no Eleventh Amendment barrier to the suits against the ICC Commissioners because of the *Ex parte Young* doctrine. The district court's decision in this case preceded the Supreme Court's decisions in *Alden, College Savings* and *Florida Prepaid,* and, therefore, the district court could not have accounted for any impact those decisions might have on the Eleventh Amendment analysis.

(a)

The district court first determined that *Seminole Tribe v. Florida,* 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), had not invalidated the doctrine of implied waiver. In

the court's view, although *Seminole Tribe* restricted Congress' ability to abrogate directly the states' sovereign immunity, the Supreme Court's decision left untouched the "unremarkable and completely unrelated" doctrine of waiver. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, *19, No. 97 C 2225, 1998 WL 156678, at *6 (N.D. Ill. 1998) (quoting *Seminole Tribe,* 517 U.S. at 63) (internal quotation marks omitted). The district court then concluded that the ICC had participated voluntarily in the regulatory scheme established by the 1996 Telecommunications Act because the Act provided states with the option to arbitrate and to approve the interconnection agreements themselves or, instead, to let the FCC perform that function. Additionally, the district court noted, Congress had made it expressly clear in subsection 252(e)(6) that, if a state opted to participate in the regulatory scheme, its actions would be reviewable in federal court. Thus, the court concluded, the ICC had waived immunity from suit in federal court by participating voluntarily in the arbitration and approval process.

(b)

In the alternative, the district court also held that the doctrine of *Ex parte Young* provided a basis for the ICC Commissioners' lack of Eleventh Amendment immunity from this suit. The district court first noted that, contrary to the ICC Commissioners' arguments, the relief sought by Ameritech Illinois and MCI was prospective in nature. The companies sought no money damages but only declaratory and injunctive relief to redress ongoing violations of federal law.

The district court also rejected the ICC Commissioners' argument that an *Ex parte Young* action is available only

when plaintiffs allege a constitutional (as opposed to statutory) violation. Relying on our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), the court held that an *Ex parte Young* action can be brought to vindicate violations of a federal statute.

The district court then concluded that the limitations placed on the *Ex parte Young* doctrine by *Seminole Tribe* and *Idaho v. Coeur d' Alene Tribe,* 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), did not affect the application of the *Ex parte Young* doctrine to this case. *Seminole Tribe* limited, the district court acknowledged, the reach of *Ex parte Young* in cases in which Congress has created a detailed and comprehensive remedial scheme. But, the district court held, the provisions of the 1996 Telecommunications Act at issue in this case did not create any such detailed scheme that would limit the type of remedies available to a district court. The district court further held that the narrow exception to *Ex parte Young* created in *Coeur d'Alene* also did not apply to this case. The district court explained that "the issues of sovereign immunity presented by review of state actions taken pursuant to the Telecommunication Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory." 1998 U.S. Dist. LEXIS 4470, *40, 1998 WL 156678, at *12.

Finally, the district court rejected the ICC Commissioners' argument that Congress did not intend to make states parties to the federal suits reviewing interconnection agreements, but instead meant only to provide review of the agreements themselves. In rejecting this argument, the district court pointed out that the subsection providing for federal court

review was titled "Review of State Commissions *Actions.*" *Id.* at *14.

C. The Wisconsin Litigation

1. The Lawsuits

(a)

Appeals 99-2805, 99-2873 and 99-2992 are the result of a dispute over an interconnection agreement entered into by Ameritech Wisconsin and MCI and approved by the PSCW. Ameritech Wisconsin and MCI had entered into interconnection negotiations as provided under subsection 252(a) of the Act, but because the parties failed to reach an agreement on some issues, MCI petitioned the PSCW under subsection 252(b)(1) to arbitrate the remaining issues. The PSCW held arbitration hearings and ultimately approved a final interconnection agreement between Ameritech Wisconsin and MCI.

The final agreement satisfied neither party. Thus, Ameritech Wisconsin filed suit against MCI, the PSCW, and the PSCW Commissioners in their official capacities to challenge portions of the final agreement approved by the PSCW. In its complaint, Ameritech Wisconsin alleged that certain provisions of the final agreement were contrary to the 1996 Telecommunications Act. The complaint sought declaratory and injunctive relief to enjoin the enforcement of the challenged provisions. Thereafter, MCI filed its own suit against Ameritech Wisconsin, the PSCW, and the PSCW Commissioners in their official capacities to challenge other portions of the same agreement. Like Ameritech Wisconsin, MCI alleged in its complaint that various provisions of the final agreement violated the 1996 Telecommunications Act.

MCI also sought declaratory and injunctive relief. The district court consolidated the two cases, and the United States later intervened. After the district court issued its decision in this case, each party filed its own notice of appeal.

(b)

Appeal 99-2806 involves the PSCW's interpretation and enforcement of previously approved interconnection agreements between Ameritech Wisconsin and TCG of Milwaukee, Inc. ("TCG") and between Ameritech Wisconsin and Time Warner Communications of Milwaukee L.P. ("Time Warner"). Ameritech Wisconsin and TCG entered into their agreement, which was approved by the PSCW, following negotiations and arbitration; Ameritech Wisconsin and Time Warner arrived at their final agreement, which the PSCW also approved, after negotiations only.

Ameritech Wisconsin's interconnection agreements with TCG and Time Warner require "reciprocal compensation" only for "local traffic" calls (calls "beginning" and "terminating" within the "local calling area"). After the PSCW had approved these agreements, a dispute arose over whether Ameritech Wisconsin was required, under its respective interconnection agreements with TCG and Time Warner, to pay reciprocal compensation for calls placed by Ameritech Wisconsin customers to the Internet via Internet service providers who were, in turn, customers of TCG or Time Warner. Because Ameritech Wisconsin believed that the disputed Internet calls did not "terminate" within the local calling area, it deemed these calls not to be "local traffic" and therefore refused to pay reciprocal compensation for them.

TCG and Time Warner, however, understood their respective interconnection agreements to entitle them to reciprocal compensation for the disputed Internet calls. Thus, they filed separate complaints with the PSCW. The companies alleged that Ameritech Wisconsin was not complying with the reciprocal compensation provisions of their respective interconnection agreements, and they asked the PSCW to enforce those provisions. The PSCW adopted the interpretation proffered by TCG and Time Warner and later entered separate enforcement orders against Ameritech Wisconsin ordering it to pay the requested reciprocal compensation. Ameritech Wisconsin then filed suit in the district court and named as defendants TCG, Time Warner, the PSCW, and the PSCW Commissioners in their official capacities. In its complaint, Ameritech Wisconsin alleged that the PSCW's enforcement orders were contrary to the 1996 Telecommunications Act, FCC regulations, and Wisconsin law. The complaint sought declaratory and other equitable relief.

(c)

The final appeal, 99-2811, stems from the PSCW's rejection of an SGAT filed with the PSCW by Ameritech Wisconsin. In proceedings before the PSCW, a number of new entrants opposed portions of the SGAT filed by Ameritech Wisconsin. The PSCW adopted the views of those that opposed Ameritech Wisconsin's SGAT, and the PSCW eventually rejected the SGAT. Ameritech Wisconsin filed suit in the district court against the PSCW and the PSCW Commissioners in their official capacities to obtain judicial review of that decision. Ameritech Wisconsin's complaint alleged violations of the 1996 Telecommunications Act, and, to the extent that the PSCW had purported to rely on state law to make its

decision, the complaint further alleged that the Act pre-empted the state laws. Ameritech Wisconsin sought declaratory and other equitable relief.[4]

2. The Motions to Dismiss

Like their Illinois counterparts, the PSCW and the PSCW Commissioners filed motions to dismiss each of these cases. They argued that the Eleventh Amendment provided them with immunity from suit in federal court.

Ameritech Wisconsin and MCI argued that Wisconsin had waived its immunity by choosing to regulate interconnection agreements in accordance with the 1996 Telecommunications Act. By exercising the power granted by the Act, according to Ameritech Wisconsin and MCI, the PSCW and the PSCW Commissioners had consented implicitly to being sued in federal court under subsection 252(e)(6). Alternatively, Ameritech Wisconsin and MCI argued that the PSCW Commissioners could be sued under the Ex parte Young doctrine.

3. Decision of the District Court

The district court issued two decisions relevant to our discussion. In both opinions, the district court held that Eleventh Amendment immunity barred the suits against the PSCW and the PSCW Commissioners.

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4 Three new entrants sought to intervene in Ameritech Wisconsin's suit over the SGAT, but the district court denied the motions because it concluded that the PSCW would adequately represent the prospective intervenors' interests. The district court's denial of the motions to intervene is not before us on appeal.

(a)

In its first opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 27 F. Supp. 2d 1149 (W.D. Wis. 1998), the district court granted the motions to dismiss. According to the court, the PSCW had not waived its immunity by performing its role under § 252 of the 1996 Telecommunications Act. Furthermore, the district court concluded that the suits against the PSCW Commissioners could not proceed under the *Ex parte Young* doctrine.

The district court first analyzed whether the PSCW and the PSCW Commissioners could have waived their immunity by acting on the interconnection agreements and SGAT at issue in the cases before it. In the court's estimation, Congress had made its intention sufficiently clear in the 1996 Telecommunications Act that state commissions would be subject to suit in federal court to defend their rulings. Nevertheless, the district court concluded, the Act did not obtain a valid, voluntary waiver of immunity from states. The court reached this conclusion after evaluating the Supreme Court's decisions in *Parden v. Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), and *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,* 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973), both of which concerned the so-called "constructive waiver" doctrine.

According to the district court, under these cases the constructive waiver doctrine could not apply to the 1996 Telecommunications Act for several reasons. First, the court noted that, despite the many changes in telecommunications

regulation wrought by the Act, the Act preserved the states' role as the primary regulators of local telephone service; the district court understood the Supreme Court's holding in *Employees* to preclude the application of the constructive waiver doctrine "when the federal government amends or enacts a law making a state subject to suit merely by continuing in existing activities to protect its citizens." 27 F. Supp. 2d at 1158 (citing *Employees,* 411 U.S. at 296 (Marshall, J., concurring)). The district court next observed that when state commissions are asked to review voluntarily negotiated interconnection agreements, state commissions must review that agreement "or accept the consequence that the agreement will go into effect without any form of government oversight." *Id.* Finally, the district court explained its view that "staying out of the interconnection process cannot be said to be a realistic option for a state commission" because the commission cannot be expected to abandon its mandate to protect the public interest. *Id.* For these reasons, the district court explained, any waiver obtained from Wisconsin under the Act could not have been voluntary.

The district court also determined that the *Ex parte Young* doctrine was inapplicable to these cases. The court reached this conclusion based on its reading of the Supreme Court's decision in *Seminole Tribe.* According to the district court, in order for it to determine whether application of the *Ex parte Young* doctrine was appropriate here, *Seminole Tribe* required the court to engage in a two-step inquiry. Thus, it analyzed (1) whether Congress created a remedy for the rights created in the 1996 Telecommunications Act and (2) whether the remedy created by Congress contemplated a suit against a state official. The district court never reached the second

aspect of this inquiry because it concluded that, with the Act, Congress had created an adequate remedy to secure federal rights such that *Seminole Tribe* precluded the application of the *Ex parte Young* doctrine in these cases. The district court explained that, although the remedy created in subsection 252(e)(6) was "much less 'detailed' " than the statutory remedy at issue in *Seminole Tribe,* the court believed that it would be improper simply to compare the two statutory schemes to see which one was more detailed. *Id.* at 1161. Rather, the court stated, "a 'simple' remedy may be all that is necessary to secure federal rights." *Id.* The district court concluded that Congress made a choice in the Act to limit the available remedy under § 252 "to having a commission's ruling tested in federal court." *Id.* This "limited review" scheme, said the court, allowed federal courts "to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court." *Id.* Under *Seminole Tribe,* the court concluded, the *Ex parte Young* doctrine could not be used here "because the remedy Congress chose secures federal rights adequately." *Id.* That Congress had chosen, as it turns out, an unconstitutional remedy did not change the result here, the district court explained, because under *Seminole Tribe* it was "prevented from 'rewriting the statutory scheme in order to approximate what [it thought] Congress might have wanted.' " *Id.* (quoting *Seminole Tribe,* 517 U.S. at 76).

(b)

Although the district court had ruled that the suits against the PSCW and the PSCW Commissioners should be dismissed, the court stayed the enforcement of its ruling pending further briefing and argument by the parties on whether

the PSCW and the PSCW Commissioners were necessary parties under Rule 19(b) of the Federal Rules of Civil Procedure. The district court also allowed the PSCW and the PSCW Commissioners to amend their answers to include a Tenth Amendment defense.

Before the district court issued an opinion addressing the remaining Rule 19(b) issues, however, we issued our initial decision in 98-2127. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n,* 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). The district court ordered further briefing and argument from the parties on the effect our opinion had on the cases before the district court. Then, the Supreme Court issued its rulings in *Alden, College Savings* and *Florida Prepaid.* After hearing argument from the parties, the district court issued a final opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 57 F. Supp. 2d 710 (W.D. Wis. 1999), dismissing the suits.

In this second ruling, the district court explained that our initial decision in 98-2127 was no longer controlling in light of the Supreme Court's intervening decision in *College Savings.* According to the district court, it was obligated to follow the most recent Supreme Court precedent, and *College Savings,* the court believed, compelled the dismissal of the suits against the PSCW and the PSCW Commissioners. The district court recognized that *College Savings* preserved "some apparent constructive waivers," such as when Congress provides a gift to a state in return for the state's waiver of immunity, but it concluded that the Supreme Court's decision precluded the finding of such a waiver in the context of the 1996 Telecommunications Act. *Id.* at 715. Instead, the court explained, "[t]here is no arguable basis to a claim that

equates a gift with a state's participation in the act's cooperative federalism (supervising the regulation of local telephone carriers in the state)." *Id.* Within the context of the 1996 Telecommunications Act, the district court explained, a state's acceptance of the "gift" of being able to participate in the interconnection process could not be equated with the kind of "gifts" found acceptable by the Supreme Court in *College Savings*. "A state's continued regulation of local enterprise (local telephone carriers)," the district court reasoned, "is an 'otherwise permissible activity' that can yield no inference as to a state's motivation for doing it." *Id.*

The district court also reaffirmed its prior ruling on the applicability of the *Ex parte Young* doctrine. In addition to the points it had raised in its first decision, the court further noted two other problems with proceeding under the *Ex parte Young* doctrine in these cases. First, the court noted that "one must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to have performed those functions improperly." *Id.* at 713. Second, the court noted "the oddity" of allowing an *Ex parte Young* suit to proceed against individual commissioners, some of whom may have dissented from the decision being challenged in court. *Id.* In the end, however, the district court explained that, even if these hurdles to applying the *Ex parte Young* doctrine could be overcome, *Seminole Tribe* precluded the application of the doctrine to these cases because the 1996

Telecommunications Act provided a limited remedy for violations of the Act.[5]

II. DISCUSSION

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has long held that this Amendment bars federal jurisdiction over suits brought against a state, not only by citizens of another state or a foreign state, but also by its own citizens. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Hans v. Louisiana*, 134

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5 In its second decision, the district court also held that, in light of this circuit's decision in *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), the PSCW and the PSCW Commissioners were necessary parties to these suits. Because the PSCW and the PSCW Commissioners were necessary parties and because the district court had concluded that they were entitled to immunity, the district court held that the cases had to be dismissed in their entirety for failure to join necessary parties. We hold today, however, that the PSCW and the PSCW Commissioners may be sued in federal court; thus, we need not address the Rule 19(b) arguments raised by the parties.

U.S. 1, 13-15, 33 L. Ed. 842, 10 S. Ct. 504 (1890). The immunity conferred on a state by the Eleventh Amendment extends to state agencies as well. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993). Subject to the exception carved out in *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), the Eleventh Amendment also bars federal jurisdiction over suits against state officials acting in their official capacities when the state is the real party in interest. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) *("Pennhurst II")*.

The immunity afforded to states by the Eleventh Amendment, however, is not absolute. *See College Savings*, 527 U.S. at 670. Congress may exercise its power under the Fourteenth Amendment and thereby authorize private suits against unconsenting states. *See id.; Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976). A state also may waive its immunity from suit. *See College Savings*, 527 U.S. at 670; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985); *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997). Additionally, the *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law. *See, e.g., Ex parte Young*, 209 U.S. at 159-60; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999); *Marie O.*, 131 F.3d at 615.

We review de novo a district court's judgment on whether to dismiss a claim on Eleventh Amendment immunity grounds. *See Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 764 (7th Cir. 1998), *abrogated on other*

grounds by Kimel v. Florida Bd. of Regents, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).

A. Threshold Matters

As a threshold matter, the ICC and the ICC Commissioners, relying on subsection 252(e)(6), submit that we need not concern ourselves with the application of the Eleventh Amendment because the 1996 Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves. We cannot accept this contention; the provisions of the Act, read as a whole, will not permit such a construction and, indeed, make clear that Congress' intent was to the contrary.

At the outset, we note that the subsection providing for judicial review is titled "Review of State commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions. Moreover, subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (Supp. II 1996). This language indicates that Congress envisioned suits reviewing "actions" by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.

In a similar vein, the PSCW and the PSCW Commissioners contend that we lack subject matter jurisdiction in case 99-2806 because that case involves the enforcement of previously approved interconnection agreements. According to the PSCW and the PSCW Commissioners, subsection 252(e)(6) does not confer jurisdiction on federal courts to review enforcement or other post-approval determinations made by state commissions. Instead, they submit, the plain language of subsection 252(e)(6) limits federal jurisdiction to reviewing a state commission's approval or rejection of an interconnection agreement or SGAT.

We decline to read subsection 252(e)(6) so narrowly. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-81 (5th Cir. 2000). A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission. *See id.* at 479-80; *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 804 & n.24 (8th Cir. 1997) (stating that "the state commissions' plenary authority to accept or reject these [interconnection] agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved"), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999).[6] In sum, we believe

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6 *See also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10 (1st Cir. 1999) (assuming, without deciding, that state commission interpretations and enforcements of agreements are subject to federal court review under subsection 252(e)(6)).

that subsection 252(e)(6) contemplates that state commissions will be parties to suits brought by those aggrieved by their determinations. This provision confers federal jurisdiction to review "state commission rulings on complaints pertaining to interconnection agreements and . . . such jurisdiction is not restricted to mere approval or rejection of such agreements." *Southwestern Bell,* 208 F.3d at 481; *see also Illinois Bell Tel. Co. v. Worldcom Techs.,Inc.,* 179 F.3d 566, 570-71 (7th Cir. 1999) (stating that federal courts have jurisdiction under subsection 252(e)(6) to review "actions" by state commissions that relate to interconnection agreements).

B. Abrogation

Unquestionably, Congress could not have abrogated state sovereign immunity with the 1996 Telecommunications Act. The Act is an exercise of Congress' Commerce Power under Article I of the Constitution, *see* 47 U.S.C. § 151 (Supp. II 1996), and as the Supreme Court has made inescapably clear, Congress may not abrogate Eleventh Amendment immunity through the exercise of its Article I powers. *See College Savings,* 527 U.S. at 672; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Seminole Tribe v. Florida,* 517 U.S. 44, 72, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Thus, because the states' immunity cannot be abrogated by the 1996 Telecommunications Act, we must look to whether Il-

linois and Wisconsin have waived their Eleventh Amendment immunity in the cases before us.

C. Waiver

1.

The decision to waive Eleventh Amendment immunity lies solely with the state, *see College Savings,* 527 U.S. at 675, and we "indulge every reasonable presumption against" a state's waiver of its immunity, *see id.* at 682 (quotation marks and citation omitted). Thus, the test "for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 675 (quoting *Atascadero,* 473 U.S. at 241 (internal quotation marks omitted)). We may find that a state has waived its immunity when "the State voluntarily invokes" federal jurisdiction or when "th State makes a 'clear declaration' that it intends to submit itself" to federal jurisdiction. *College Savings,* 527 U.S. at 675-76 (citations omitted). In either case, there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero,* 473 U.S. at 238 n.1; *see also College Savings* 527 U.S. at 680 ("The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit."); *Mueller v. Thompson,* 133 F.3d 1063, 1064 (7th Cir. 1998) ("No magic words are required, but implicit waivers won't do; the court must be highly confident that the state really did intend to allow itself to be sued in federal court." (citations omitted)).

2.

The Supreme Court's recent decisions in *Alden, College Savings* and *Florida Prepaid* have refined the jurisprudence with respect to state sovereign immunity. The Court's decisions in *Alden* and *Florida Prepaid,* although impacting Eleventh Amendment jurisprudence in other important ways, do not bear directly on the questions of waiver that we confront in our cases. In contrast, the Court's decision in *College Savings* is especially pertinent to our analysis here because that decision squarely addressed Congress' power to obtain waivers of state immunity when Congress acts within its Article I powers. In *College Savings,* the Court held that states do not "constructively" waive their sovereign immunity by engaging in activities in interstate commerce that are regulated by Congress under its Article I power. *See College Savings,* 527 U.S. at 680. By so holding, the Court overruled *Parden v. Terminal Railway of the Alabama Docks Department,* 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), a case in which the Court had held that Alabama waived its sovereign immunity by operating a railroad that was regulated by Congress under its Commerce Power.

At issue in *College Savings* was whether the state of Florida had "constructively" waived its immunity by marketing a college savings plan in interstate commerce. By an amendment to the Lanham Act[7], Congress had subjected states to suit in federal court for false representations in commerce, and the plaintiff, College Savings Bank, argued that Florida had waived its immunity by engaging in the activity regu-

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7 See 15 U.S.C. §§ 1122, 1125(a) (as amended by the Trademark Remedy Clarification Act, Pub. L. No. 102-542, § 3(b)-(c), 106 Stat. 3567, 3567-68 (1992)).

lated by that federal statute. The Supreme Court disagreed. According to the Court, Florida could not waive its immunity merely by engaging in the regulated activity because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings,* 527 U.S. at 680; *see also Burnette v. Carothers,* 192 F.3d 52, 60 (2d Cir. 1999) (holding, in a post-*College Savings* case, that a state did not consent to suit for CERCLA violations by operating a prison that had released toxic chemicals).

The commissions in our cases argue that the Court's decision in *College Savings* has eliminated all so-called "constructive" or "implied" waivers. We, however, cannot agree with their assessment of that case. The Court in *College Savings* limited its abandonment of "constructive" or "implied" waivers to the "ill conceived" "constructive-waiver experiment of *Parden.*" *College Savings,* 527 U.S. at 680. Indeed, the Court did not call into question other types of "constructive" waivers obtained by Congress acting within its Article I powers. Rather, the Court simply held that states cannot "constructively" waive their immunity by being forced by Congress to choose between preserving their sovereign immunity and engaging in an "otherwise lawful activity." *Id.* at 687.

To illustrate the types of "constructive" waivers that Congress may still obtain from states, the Court provided two examples of constructive waivers that are "fundamentally different" from *Parden*-style waivers and that are viable after *College Savings. Id.* at 686. In the first example, *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959), Congress required Tennes-

see and Missouri to waive their immunity as a condition for Congress' approval of the interstate compact made between the two states. The Court in *College Savings* explained that the constructive waiver exacted by Congress in that case was valid because, under the Compact Clause of the Constitution, states cannot form interstate compacts without congressional approval. As the Court explained it, Congress' consent to an interstate compact is a "gratuity" that Congress could give or withhold. *College Savings*, 527 U.S. at 686.

In the second example, *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987), the Court held that Congress could impose conditions on a state's acceptance of federal funds allocated under the Spending Power. In *Dole*, Congress had conditioned the allocation of federal highway funds on South Dakota's raising its drinking age. The Court in *College Savings* explained that its holding in *Dole* made clear that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Savings*, 527 U.S. at 686. Just as it was a "gratuity" for Congress to approve an interstate compact, the Court in College Savings noted that federal funds were a "gift" from Congress that it was under no obligation to give. *Id.* at 686-87.

Because the Court in *College Savings* endorsed some kinds of "constructive" waivers, we cannot accept the commissions' argument that all constructive waivers are now foreclosed. We instead understand the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states. *See id.* at 690 (stating that "our

opinion today has sought to discern what the bounds [of federal power] are"). In *Seminole Tribe*, the Court had held that Congress could not abrogate state sovereign immunity through the exercise of its Article I powers. *Parden*-style waivers--in which a state was deemed to have waived its immunity simply by engaging in an activity regulated by Congress in the exercise of its Article I powers--nevertheless effectively allowed Congress to circumvent the holding of *Seminole Tribe*. *See id.* at 683. As the Court explained in *College Savings*, the type of "forced waiver" exacted by Congress under *Parden*, whereby the state is threatened with the sanction of waiving its immunity if it engages in a regulated enterprise, was really an abrogation of the state's immunity prohibited by *Seminole Tribe*. *See id.* (noting that forced waiver and abrogation are "the same side of the same coin"); *see also Chavez v. Arte Publico Press*, 204 F.3d 601, 604 n.5 (5th Cir. 2000) *("College Savings* expressly overruled *Parden* and its implied waiver theory. That theory is no longer available to support an Article I *abrogation* of Eleventh Amendment Immunity." (emphasis added) (citation omitted)). The Court's decision in *College Savings* closed the "forced waiver" loophole left open by *Parden*.

With these principles in mind, we shall now turn to the cases before us to examine whether there is a valid waiver.

3.

We first examine, as a threshold matter, whether Congress, in inviting the states to waive their Eleventh Amendment immunity, has done so with sufficient clarity. When it intends to obtain a waiver of immunity from the states, Congress must "speak with a clear voice" so that the states may

exercise their choice to waive their immunity "knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) *("Pennhurst I"); accord Atascadero*, 473 U.S. at 238-40 (stating that the Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states (citation omitted)); *see also Dole*, 483 U.S. at 207 (quoting *Pennhurst I* and stating that Congress must state the condition "'unambiguously'").

The commissions submit that there can be no waiver of sovereign immunity in these cases because the language of the 1996 Telecommunications Act contains no clear and unambiguous expression of Congress' intent to condition the states' participation in the Act's regulatory scheme on their consent to suit in federal court. The commissions point out that the Act does not even mention sovereign immunity or indicate an intent to give states a choice between carrying out their responsibilities under the Act or retaining their sovereign immunity by letting the FCC fulfill their responsibilities. The absence of these elements from the statutory language negates, in the commissions' view, any possibility of a valid waiver; the statutory language contains no explicit manifestation that Congress clearly intended to condition the states' participation under the Act on their waiver of sovereign immunity.

We cannot accept this argument. Although the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. § 252 (Supp. II 1996), nevertheless makes clear that Congress intended to provide for

federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place. Section 252 first describes the duties of the carriers seeking to enter into an interconnection agreement and then details the role of the state commissions in the mediation, arbitration and review process. It sets forth the standards by which the state commissions may impose terms upon the parties to the interconnection agreements during arbitration as well as the standards by which the state commissions must approve or reject an agreement. Subsection 252(e)(5) then provides that, if a state commission does not carry out its responsibilities under § 252, the FCC will act in place of the state commission. Subsection 252(e)(6), titled "Review of State commission actions," then provides that the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions. It further provides that any party aggrieved by a state commission's determination under § 252 may obtain review "in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996).

Thus, under the terms of § 252, the state commission or, if that body chooses not to act, the FCC will exercise regulatory authority over interconnection agreements. That administrative action, whether taken by a state administrative tribunal or by the FCC, is subject to review in federal court. If the reviewing body is a state commission, the statute provides that the commission's actions are reviewable in federal court under subsection 252(e)(6); if the reviewing body is the

FCC, its actions are reviewable in federal court under 28 U.S.C. § 2342(1). In short, Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court. We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court. *Accord MCI Telecomms. Corp. v. Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, at *8 (10th Cir. June 20, 2000) (concluding that § 252 puts states on notice that Congress intends to subject them to suit in federal court if they act under § 252).

4.

We now turn to the question of whether the states have unequivocally waived their Eleventh Amendment immunity. As the Supreme Court has noted, there is "a fundamental difference" between "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived [its] immunity" and "a State's expressing unequivocally that it waives its immunity." *College Savings,* 527 U.S. at 680-81. Therefore, we must determine whether the states made a clear declaration that they desired to waive their immunity.

The carriers do not contend that Illinois or Wisconsin waived their immunity by statute. Rather, they maintain that these states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act

as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act. We agree with that assessment and therefore hold, as the Tenth Circuit held in *MCI Telecommunications Corp. v. Public Service Commission*, 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, (10th Cir. June 20, 2000), that states voluntarily waive their sovereign immunity by accepting that invitation.

The commissions endeavor to distinguish the *Petty*- and *Dole*-style waivers endorsed by the Supreme Court in *College Savings* from the situations in the cases before us. According to the commissions, the waivers obtained by the 1996 Telecommunications Act are fundamentally different than those in *Petty* and *Dole*. They point out that *Petty* involved Congress' Compact Power and *Dole* its Spending Power, while the 1996 Telecommunications Act is an exercise of Congress' Commerce Power. We do not believe that this distinction is helpful to the analysis required by *College Savings*. In *College Savings*, the Supreme Court's analysis did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers, all of which are Article I powers. Rather, the validity of a purported waiver turns on whether the waiver is conditioned on the state's truly voluntary acceptance of a federal "gratuity." *Accord Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *19, 2000 WL 783382, at *7 ("[F]or a constructive waiver of sovereign immunity to be valid under *College Savings Bank*, it must be altogether voluntary and not forced from a state by Congress."). The significant commonality between *Dole* and *Petty* is *not* that each involved a power other than the Commerce Power; the key in those cases was that Congress had

the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take.

It is clear that Congress, in exercising its Commerce Power, *could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government. *See F.E.R.C. v. Mississippi,* 456 U.S. 742, 764, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. And with the 1996 Telecommunications Act, we believe it equally clear that Congress *did* take over some aspects of the telecommunications industry. *See AT&T Corp.,* 525 U.S. at 378-79 n.6 (stating that, as to those aspects addressed by the 1996 Telecommunications Act, Congress has "unquestionably" taken the regulation of local telecommunications competition away from the states); *Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. Although Congress cannot abrogate state sovereign immunity by exercising its Article I powers, *see Seminole Tribe,* 517 U.S. at 72-73, and cannot "commandeer" state regulatory agencies with legislation forcing them to regulate on behalf of Congress, *see Printz v. United States,* 521 U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997); *New York v. United States,* 505 U.S. 144, 168, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), these limitations on congressional power do not prohibit Congress from obtaining a state's voluntary consent to federal jurisdiction. With the 1996 Telecommunications Act, Congress has created a complex federal regulatory scheme

for many aspects of the telecommunications industry. One component of that scheme is the invitation from Congress to the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market. Congress certainly had the power to take up the regulation of these areas on its own, and it certainly can invite the states to act on its behalf in carrying out those regulatory functions.

After the 1996 Telecommunications Act, the regulation of interconnection agreements and the approval of SGATs are no longer, in the terms employed by the Supreme Court in *College Savings*, "otherwise permissible activities" for the states. 527 U.S. at 687; *cf. Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *23-24, 2000 WL 783382, at *8 ("[W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity."). Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms. Unlike the situation in *Parden* and in *College Savings*, the states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress*.[8] Unlike the

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8 *See also Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *21, 2000 WL 783382, at *8 (" 47 U.S.C.A. § 252 invites states to participate in the federal government's regulation of local telephone service."); Peter W. Huber et al., *Federal Telecommunications Law* § 3.3.4, at 227 (2d ed. 1999) ("As a backdrop to its primary reliance on privately negotiated agreements, however, Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due

situation in *Parden,* in which Alabama exercised its sovereign authority to operate a railroad, the state commissions have conducted arbitrations for interconnection agreements, have approved and enforced those agreements, and have acted on an SGAT under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority.

The commissions submit that the waivers in our cases cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power. This is so, the commissions tell us, because with Spending Clause waivers the states effectively enter into a "contract" with Congress--in exchange for the federal funding, the state agrees to the terms offered by Congress. We think that the commissions' analogy, however, tends to support, rather than weaken, our conclusion. The state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms.[9] The only difference between the

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regard to the local conditions and the particular historical circumstances of local regulation under the prior regime.").

9 *Cf. Litman v. George Mason Univ.,* 186 F.3d 544, 555 (4th Cir. 1999) (holding that a public university had waived its immunity by accepting Title IX funding and thus agreeing to the condition of waiver Congress had attached to those funds), *cert. denied,* 145 L. Ed. 2d 1120, 120 S. Ct. 1220 (2000); *In re Innes,* 184 F.3d 1275, 1284 (10th Cir. 1999) (holding that a state had waived voluntarily its immunity by agreeing to participate in the federal Perkins Loan Program, a federal program in which states are required to undertake certain actions in federal bankruptcy court proceedings), *cert. denied,* 146 L. Ed. 2d 345, 120 S. Ct. 1530 (2000).

classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a "deputized" federal regulator. In exchange for this grant of regulatory power, Congress has required the states to agree to submit to federal jurisdiction to review their actions. In *Dole,* the gratuity was money; the condition was a higher drinking age. Here, the gratuity is federal regulatory power; the condition is waiver of the state's immunity. Having accepted the regulatory power offered by Congress, Illinois and Wisconsin now must accept the condition that was attached to that grant of power. *Cf. Board of Educ. of Oak Park v. Kelly E.,* 207 F.3d 931, 935 (7th Cir. 2000) (noting that "[o]ne string attached to money under the IDEA is submitting to suit in federal court" and holding that "having accepted the money, [states] must litigate in federal court"), *petition for cert. filed,* 69 U.S.L.W. 3001 (U.S. June 16, 2000) (No. 99-2027).[10]

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10 It has been suggested to us that the commissioners do not have the power to waive the immunity of their respective states; that only the state legislatures can waive their states' Eleventh Amendment immunity. We believe, however, that the waivers of immunity have come from the states themselves (and not the commissions). It is the states that have authorized the commissions to regulate the telecommunications industry, *see* Ill. Comp. Stat. 5 2-101; Wis. Stat. § 196.02, and, despite the clear warning from Congress in subsection 252(e)(6) of the 1996 Telecommunications Act, neither Illinois nor Wisconsin have taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress. Indeed, the states have agreed unmistakably

We believe that *College Savings* does not alter the principle that states may waive their immunity by accepting a benefit from Congress that has conditions attached to that acceptance.[11] Congress could--and did--take over regulation of a part of the telecommunications industry in accordance with its Commerce Power. Such regulation is no longer an "otherwise permissible activity" for states. Congress may choose to "give back" to states some of the regulatory power Congress has taken away, and Congress may attach conditions to the return of that power. *Cf. College Savings,* 527 U.S. at 686-87 (explaining that, when Congress bestows a gift or gratuity, it may attach conditions to a state's acceptance of that gift or gratuity). States are free to accept or reject the terms Congress has offered the states if they want a contin-

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and affirmatively to waive their immunity. By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power.

11 At one time, privately negotiated agreements were at issue in a case before us. But as we have explained, *supra* note 3, we have granted Ameritech Illinois' motion to remand 98-2256 to the district court for a voluntary dismissal with prejudice. We therefore need not decide--and reserve for another day--whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be "deemed approved" under 47 U.S.C. § 252(e)(4) (Supp. II 1996). *Cf. College Savings,* 527 U.S. at 687 (stating that, in some instances, the inducement offered by Congress might be so coercive that the voluntariness of the waiver is destroyed).

ued role in regulating this segment of the local telephone service market.[12]

D. *Ex parte Young*

1.

As an independent basis for decision, we also believe that the Eleventh Amendment does not bar the carriers from pursuing injunctive relief against the individual members of the state commissions. Under the *Ex parte Young* doctrine, a private party may sue individual state officials in federal court to obtain prospective relief for an ongoing violation of federal law. *See Ex parte Young,* 209 U.S. at 159-60; *Idaho v. Coeur d' Alene Tribe,* 521 U.S. 261, 294, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring); *id.* at

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12 We are not unmindful that our colleagues in the Sixth Circuit have expressed the view that, in light of the Supreme Court's decisions in *College Savings* and *Florida Prepaid,* "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Telecommunications Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE North, Inc. v. Strand,* 209 F.3d 909, 922 n.6 (6th Cir. 2000); *see also Michigan Bell Tel. Co. v. Climax Tel. Co.,* 202 F.3d 862, 867 & n.2 (6th Cir. 2000) (declining to find that the state had waived its immunity by regulating under the Act and instead relying on the *Ex parte Young* doctrine to allow suits against individual state commissioners), *petition for cert. filed,* 68 U.S.L.W. 3742 (U.S. May 15, 2000) (No. 99-1878). As we have already indicated, however, we believe that the Court of Appeals for the Tenth Circuit has expressed the correct view, and we agree with its analysis. *See Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8.

298-99 (Souter, J., dissenting) ("The plaintiff must allege that the officers are acting in violation of federal law, and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past." (internal citation and footnote omitted)); *Marie O.*, 131 F.3d at 615. Under this doctrine, federal courts are enabled to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst II*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).[13] The Supreme Court's decisions in *Alden*, *College Savings* and *Florida Prepaid* have not called the *Ex parte Young* doctrine into question. Indeed, the Court in *Alden* reaffirmed the doctrine's role in the sovereign immunity context. *See Alden v. Maine*, 527 U.S. 706, 748, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (calling the *Ex parte Young* doctrine an "essential" part of the Court's sovereign immunity jurisprudence).

We agree with the Sixth and Tenth Circuits that these suits are "straightforward" *Ex parte Young* cases. *Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 (holding that state commissioners may be sued under the *Ex parte Young* doctrine for their approval and enforcement of a § 252 interconnection agreement); *Michigan Bell Tel. Co.*, 202 F.3d at 867 (same). The carriers seek injunctive relief from what they allege to be determinations made by the commissioners that are contrary to the 1996 Telecommunications Act. The commissioners argue that, if any viola-

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13 The *Ex parte Young* doctrine may not be used to enjoin violations of state law. *See Pennhurst II*, 465 U.S. at 106.

tions occurred, they occurred in the past, and that therefore the *Ex parte Young* doctrine should not apply. We cannot accept this argument. The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. *See Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) ("While the relief granted under *Ex parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be."). Such relief is precisely the type contemplated by the *Ex parte Young* doctrine. Thus, the carriers' suits fit squarely within the traditional framework of *Ex parte Young*.

2.

The commissioners submit that the Supreme Court's decision in *Seminole Tribe* renders the *Ex parte Young* doctrine inapplicable to the cases before us. In *Seminole Tribe*, the Supreme Court admonished that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. According to the commissioners, Congress has created in § 252 a "detailed remedial scheme" that is on par with the remedial scheme at issue in *Seminole Tribe*. Consequently, the commissioners argue, an *Ex parte Young* suit against them would run afoul of the Court's decision in *Seminole Tribe*.

We cannot accept the commissioners' characterization of the available remedies under the 1996 Telecommunications

Act and, consequently, find their analogy to the situation in *Seminole Tribe* to be flawed. Section 252 of the Act does not create a "detailed remedial scheme" that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations. The enforcement provision implicated in our cases merely states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996). The power of the court under subsection 252(e)(6) stands in stark contrast with the court's powers to impose what the Supreme Court called a "modest set of sanctions" under the statute at issue in *Seminole Tribe*. *Seminole Tribe*, 517 U.S. at 75.

In *Seminole Tribe*, the Court addressed the judicial enforcement scheme created by the Indian Gaming Regulatory Act ("the IGRA"). Congress had passed the IGRA in 1988 in order to provide a statutory framework for the operation and regulation of tribal gaming operations. Under the IGRA, Indian tribes could enter into the most heavily regulated class of gaming (*i.e.*, slot machines, casino games, banking card games, dog racing, and lotteries) only after certain conditions had been met. One of those conditions imposed by the IGRA was that the tribe's operations had to conform to a valid compact between the tribe and the state in which the gaming operations were located. *See* 25 U.S.C. § 2710(d)(1).

The IGRA set forth the process by which tribes and states were to enter into these compacts. First, a tribe was required

to request that the state enter into compact negotiations. Once a request had been made, the state was obligated under the IGRA to "negotiate with the Indian tribe in good faith" to enter into a compact. *Id.* § 2710(d)(3)(A). Still other provisions of the IGRA made the state's obligation to negotiate in good faith judicially enforceable. *See id.* § 2710(d)(7)(A)(i) and (B)(i). Other provisions set forth what the Supreme Court described as "an elaborate remedial scheme" designed to ensure that a Tribal-State compact would be formed. *See id.* § 2710(d)(7)(B)(ii)-(vii).[14] Under this scheme, if the dis-

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14 To illustrate the elaborate nature of this remedial scheme, we shall set out the Supreme Court's full description of it: Sections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7) (B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of the Act and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State consents to

trict court determined that the state had failed to negotiate in good faith, the IGRA only allowed the court to issue an order mandating that the tribe and the state enter into a compact within 60 days. *See Seminole Tribe,* 517 U.S. at 74. If the parties disregarded this order, the only recourse available to the district court was to order each party to submit a proposed compact to a mediator, who would then choose one. *See id.* at 74. And if the state refused to accept the compact chosen by the mediator, the IGRA provided that the mediator was to inform the U.S. Secretary of the Interior, who would then issue regulations to govern the tribe's gaming operations. *See id.* at 74-75.

Unlike the IGRA, in which "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young,*" *Seminole Tribe,* 517 U.S. at 75-76, Congress has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act. We reach this conclusion guided by our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997). In *Marie O.,* a case

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the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary of the Interior" and that the Secretary "shall prescribe procedures under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." § 2710(d)(7)(B)(vii). *Seminole Tribe,* 517 U.S. at 50.

decided in the wake of *Seminole Tribe,* we held that the Individuals with Disabilities Education Act ("the IDEA") did not contain an "explicit remedial scheme" that would prevent an *Ex parte Young* suit. *Marie O.,* 131 F.3d at 616. The IDEA section involved in that case empowered a district court to grant " 'such relief as it determines is appropriate' " to ensure compliance with certain provisions of the IDEA. *Id.* (quoting 20 U.S.C. § 1480(1)). Importantly, we noted that the remedial measures available under the IDEA did not expressly limit the role of the district court in redressing complaints with regard to the IDEA. Similarly, subsection 252(e)(6) does not limit the role or the power of the district court. Quite the contrary, subsection 252(e)(6) is silent as to how a district court would enforce its ruling under that section. Thus, we hold that *Seminole Tribe* does not preclude an *Ex parte Young* suit against the state commissioners here.

3.

Nor can we accept the contention that the Supreme Court's decision in *Coeur d'Alene Tribe* bars *Ex parte Young* suits by the carriers against the commissioners. The commissioners maintain that *Ex parte Young* suits against them would trammel "special sovereignty interests" of their states and, thus, should be precluded by *Coeur d'Alene Tribe.*

In *Coeur d'Alene Tribe,* a majority of the Court held that a federal court cannot grant prospective equitable relief under the *Ex parte Young* doctrine when that relief would implicate "special sovereignty interests" of the state and would be the "functional equivalent" to a form of legal relief otherwise barred by the Eleventh Amendment. *Coeur d' Alene Tribe,* 521 U.S. at 281-82. More precisely, the Court held that the

Ex parte Young doctrine was inapplicable to the "particular and special circumstances" present in that case. *Id.* at 287. A majority of the Court held that the lawsuit against Idaho could not proceed under the *Ex parte Young* doctrine because the suit, in which the Coeur d'Alene Tribe sought to have the federal court divest the state of its ownership of land under Lake Coeur d'Alene, in essence would affect "Idaho's sovereign interest in its lands and waters" to a degree "fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287; *see also id.* at 296 (O'Connor, J., concurring) (agreeing that the *Ex parte Young* doctrine should not be extended to reach the Tribe's claim "to quiet title to sovereign lands" because such a lawsuit is really a suit against the state). The Court explained that the Tribe's lawsuit could not proceed under the *Ex parte Young* doctrine because the suit was the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281.

Illinois' and Wisconsin's interests in the regulation of telecommunications providers in their respective states cannot be equated with Idaho's interest in its land, which the Court in *Coeur d'Alene Tribe* found so fundamental. In the wake of the 1996 Telecommunications Act, any "sovereign" interest Illinois and Wisconsin may have in regulating interconnection agreements and SGATs is derived solely from the regulatory role Congress has bestowed upon the states. Thus, the suits against the state commissioners to require compliance with the 1996 Telecommunications Act do not strike at core functions or fundamental powers of either Illi-

nois or Wisconsin.[15] Therefore, the availability of an *Ex parte Young* suit in our cases is not affected by the special limitation recognized by a majority of the Court in *Coeur d' Alene Tribe. Accord Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 n.8.

Conclusion

We hold that, by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Elev-

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15 *Compare J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999) (holding that "[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young"), and Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 632-33 (10th Cir. 1998) (holding that an action, which was "the functional equivalent of a breach of trust action" against the state for planned changes to its management of public lands, was within the scope of the *Ex parte Young* doctrine because the relief sought would not alter the nature of the state's ownership in the land but would affect only the manner in which the state managed the lands at issue), *cert. denied,* 119 S. Ct. 1461 (1999), *with MacDonald v. Village of Northport,* 164 F.3d 964, 972 (6th Cir. 1999) (holding that a state's "great interest in maintaining access to the Great Lakes" was a "special sovereignty interest" that precluded an *Ex parte Young* suit), *and ANR Pipeline Co. v. LaFaver,* 150 F.3d 1178, 1193 (10th Cir. 1998) (holding that a state's power to tax is akin to the "special sovereignty interests" identified in *Coeur d'Alene Tribe), cert. denied,* 525 U.S. 1122, 142 L. Ed. 2d 902, 119 S. Ct. 904 (1999).

enth Amendment immunity from suit in federal court. The federal regulatory scheme set forth in §§ 251 and 252 of the Act bestowed upon states a "gratuity." Acceptance of that federal invitation to share in the regulation of the telecommunications industry is conditioned on a waiver of Eleventh Amendment immunity. A state's decision to exercise that regulatory authority--which would otherwise lie with the federal government--necessarily constitutes a waiver of its immunity from suit in federal court.

We also hold that, under *Ex parte Young*, the Eleventh Amendment does not bar the carriers' lawsuits against the individual commissioners. Because the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief, their lawsuits fit squarely within the traditional framework of *Ex parte Young*. Moreover, the more recent limitations on *Ex parte Young* suits that the Supreme Court announced in *Seminole Tribe* and *Coeur d'Alene Tribe* are not applicable here. The 1996 Telecommunications Act does not contain a specific remedial scheme, and these lawsuits do not implicate special sovereignty interests.

Accordingly, we affirm the judgment of the district court in 98-2127. We reverse the judgment of the district court in 99-2805, 99-2806, 99-2811, 99-2873, and 99-2992, and we remand these cases to the district court for further proceedings consistent with this opinion.

98-2127 AFFIRMED;

99-2805, 99-2806, 99-2811, 99-2873 & 99-2992 REVERSED and REMANDED

APPENDIX B – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED FEBRUARY 10, 1999

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-2127

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCI METRO ACCESS TRANSMISSION SERVICES, INCORPORATED, a Delaware Corporation,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Appellees,

v.

ILLINOIS COMMERCE COMMISSION, TERRY HARVILL, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the IL Commerce Commission, *et al.*,

Defendants-Appellants.

No. 98-2256

ILLINOIS BELL TELEPHONE COMPANY, doing business as AMERITECH ILLINOIS,

Plaintiff-Appellee,

and

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Appellees,

v.

TERRY HARVILL, RICHARD KOLHAUSER, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the Illinois Commerce Commission and not as individuals, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 97 C 2225; 97 C 8285--**David H. Coar,** *Judge.*

ARGUED NOVEMBER 6, 1998--
DECIDED FEBRUARY 10, 1999
AMENDED JUNE 23, 1999*

Before RIPPLE, KANNE and Diane P. WOOD, Circuit Judges.

RIPPLE, Circuit Judge. The plaintiff telephone companies brought this action against the Illinois Commerce Commission and various individual Commissioners. The companies

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* This opinion is being released in typescript form.

alleged violations of the Telecommunications Act of 1996 in connection with the defendants' arbitration and approval of the companies' interconnection agreements.[1] The defendants now seek review of the district court's denial of their motions to dismiss each case on Eleventh Amendment grounds. For the reasons set forth in the following opinion, we affirm the judgment of the district court in 98-2127.[2]

I

BACKGROUND

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1 By order of this court, AT&T Communications v. Illinois Bell (Case No. 98-2566), originally a part of this consolidated appeal, has been remanded to the district court to permit the district court to grant voluntary dismissal to AT&T.

2 This opinion was originally issued on February 10, 1999. In its petition for rehearing in 98-2256, the Illinois Commerce Commission parties noted a factual inaccuracy in our opinion. This case did include interconnection agreements made through private negotiations without mediation or arbitration by a state commission. We therefore amend the opinion to reflect this misstatement. As noted in the text of this amended opinion, this correction does not alter the result in this case. During the pendency of the petition for rehearing, Ameritech filed a motion requesting that we remand case 98-2256 to the district court so that it may be dismissed voluntarily with prejudice. We have granted that motion and therefore need not address the applicability of the Eleventh Amendment to litigation involving such privately negotiated agreements. We note, moreover, that the argument that the Illinois Commerce Commission parties made in the petition for rehearing was not presented with sufficient specificity in their brief before this court.

A. The Statutory Scheme

Congress enacted the Telecommunications Act of 1996 ("the Act") "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act seeks to introduce competition into local telephone service markets by ending the historic monopoly held by incumbent local exchange carriers ("LECs"). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent LECs to share their networks with competitors. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers. *See* 47 U.S.C. sec. 251.

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party may ask a state commission to participate as a mediator in the negotiations. *See* 47 U.S.C. sec. 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from

the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition a state commission to arbitrate any open issues. Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by FCC regulations issued pursuant to sec. 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under this section, then the FCC will preempt the state commission's jurisdiction, assume responsibility for the proceeding, and act for the state commission in carrying out its functions.

An implementing regulation to sec. 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)--thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. sec. 51.801. A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* In such a case, the agreement will be deemed approved. *See* 47 U.S.C. sec. 252(e)(4).

Therefore, subsections 252(e)(4) and (e)(5), taken together and read in conjunction with the FCC regulation, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in its place. Only one scenario, not present in this case, appears to be an exception to this scheme: when the parties reach a voluntarily negotiated agreement without any request for mediation or arbitration and the state commission fails to act to approve or reject the agreement. When these two circumstances occur, the resulting agreement will be deemed approved by the state commission, *see* sec. 252(e)(4); the FCC will not step in to assume the approval function. In all other cases, either a state commission or the FCC will exercise regulatory oversight over the interconnection agreement process.

Finally, subsection 252(e)(6), titled "Review of state commission actions," provides that whenever a state commission fails to act, the exclusive remedies for that failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. It further provides that "[i]n any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."

B. The Litigation in the District Court

MCI filed suit against the Illinois Commerce Commission and various individual Commissioners in their official capacities. It alleged that they had violated certain sections of the Act when conducting arbitration proceedings and approv-

ing the terms of MCI's interconnection agreement with Ameritech. In the *MCI* case, Ameritech filed a cross-claim against the Commissioners asserting a similar claim. Ameritech also filed its own action against the Commissioners challenging their approval of two negotiated agreements between Ameritech and other telecommunications carriers. MCI and Ameritech sought declaratory and other equitable relief.

The defendants moved to dismiss the plaintiffs' claims on Eleventh Amendment sovereign immunity grounds. The defendants argued that the Act could not abrogate the states' immunity. They also submitted that Illinois had not explicitly authorized waiver of its immunity through any statute or constitutional provision. The defendants further contended that their participation in the arbitration and review process under the Act did not constitute waiver of sovereign immunity because no provision of the Act required the state to submit to suit as a condition for exercising the authority granted it.

The plaintiffs argued that Congress had conditioned state commissions' participation in the arbitration and approval process on their submission to federal court jurisdiction. Thus, they argued, the defendants waived any Eleventh Amendment immunity when they elected to implement the federal regulatory scheme set forth in the Act with full knowledge that their determinations would be reviewable exclusively in federal court.

In reply, the defendants reemphasized that the Act contains no specific language expressly conditioning state commission participation in the regulatory process on consent to

suit in federal court. Rather, they contended, the Act provides only for federal court review of the agreements themselves.

C. Holding of the District Court

In denying the motions to dismiss, the district court determined that the defendants constructively had waived their Eleventh Amendment immunity and, in the alternative, that there was no Eleventh Amendment barrier because of the doctrine of *Ex parte Young*.

1.

The district court first determined that *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), had not invalidated the doctrine of implied waiver. In the court's view, although *Seminole Tribe* restricted Congress' ability to abrogate directly the states' sovereign immunity, the Court's decision left untouched the "unremarkable and completely unrelated" doctrine of waiver. R.59 at 11 (quoting *Seminole Tribe*, 517 U.S. at 63) (internal quotation marks omitted).

The district court then concluded that the defendants had participated voluntarily in the regulatory scheme established by the Telecommunications Act because the Act provided states with the option to arbitrate and to approve the interconnection agreements themselves or, instead, to let the FCC perform that function. Additionally, the district court noted, Congress had made it expressly clear in subsection 252(e)(6) that, if a state opts to participate in the regulatory scheme, its actions are reviewable in federal court. Thus, by participating--voluntarily--in the arbitration and approval process, the defendants had waived immunity from suit in federal court.

2.

In the alternative, the district court also held that the doctrine of *Ex parte Young* provides a basis for the defendants' lack of Eleventh Amendment immunity from this suit. The district court first noted that, contrary to the defendants' arguments, the relief sought by the plaintiffs was prospective in nature. The plaintiffs sought not money damages but declaratory and injunctive relief to redress ongoing violations of federal law.

The district court also rejected the defendants' argument that an *Ex parte Young* action is available only when the plaintiffs allege a constitutional (as opposed to statutory) violation. Relying on our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), the court held that an *Ex parte Young* action can be brought to vindicate violations of a federal statute.

The district court then concluded that the limitations placed on the *Ex parte Young* doctrine by *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe,* 117 S. Ct. 2028 (1997), did not affect the application of *Ex parte Young* to this case. *Seminole Tribe* limited, the district court acknowledged, the reach of *Ex parte Young* in cases in which Congress has created a detailed and comprehensive remedial scheme. But, held the district court, the Telecommunications Act at issue in this case did not create any such detailed scheme that would limit the type of remedies available to a district court. The district court further held that the narrow exception to *Ex parte Young* created in *Coeur d'Alene* also does not apply to this case. The district court explained that "the issues of sovereign immunity presented by review of state actions

taken pursuant to the Telecommunications Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory." R.59 at 23.

Finally, the district court rejected the defendants' argument that Congress did not intend to make states parties to the federal suits reviewing interconnection agreements, but instead meant only to provide review of the *agreements* themselves. In rejecting this argument, the district court pointed out that the subsection providing for federal court review was titled "Review of state commission actions." R.59 at 25 (emphasis added).

II

DISCUSSION

A. Basic Principles

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

In our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), we noted that, although the Eleventh Amendment generally has been interpreted to bar litigation in federal court by private entities against a state, three exceptions to this constitutional bar exist:

> First, suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment under the *Ex parte Young* doctrine. *See Ex parte Young,* 209 U.S. 123, 159-60 (1908). Second, individuals may sue a state directly if Congress has abrogated the state's immunity from suit through an unequivocal expression of its intent to do so and pursuant to a valid exercise of its power. *See Seminole Tribe of Florida v. Florida,* 517 U.S. [44, 55] (1996). Finally, individuals may avail themselves of suits against a state that has properly waived its sovereign immunity and consented to suit in federal court. *See id.* at [54-55]; *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 (1985).

131 F.3d at 615 (parallel citations omitted).

B. Applicability of the Eleventh Amendment

As a threshold matter, the defendants, relying on subsection 252(e)(6), submit that we need not concern ourselves with the application of the Eleventh Amendment because the Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves. We cannot accept this suggestion; the provisions of the Act, read as a whole, will not permit such a construction and, indeed, make clear that Congress' intent was to the contrary. We believe that the language in subsection 252(e)(6)--"to determine whether the agreement or statement meets the requirements of section 251 and this section"--does not

speak to whether state commissions are to be parties or whether just the agreements may be reviewed, but rather speaks to the scope of the federal court's review. Because subsections 252(e)(3) and (f)(2) allow a state commission to consider state law when approving an agreement, we think it clear that subsection 252(e)(6) includes the "agreement" language quoted above to clarify that federal courts may review a state commission's actions with respect to an agreement only for compliance with the requirements of sec. 251 and sec. 252 of the Telecommunications Act, and not for compliance with state law. Moreover, we note that the subsection providing for judicial review is titled "Review of state commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions.

Subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This language indicates that Congress envisioned suits reviewing "actions" by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in the federal courts.

C. Constructive Waiver

The district court first relied upon the doctrine of waiver. We therefore turn to an examination of this basis for affirmance.

1.

The defendants first submit that the district court's reliance on constructive waiver was erroneous because *Seminole Tribe* invalidated the doctrine of constructive waiver. In the view of the defendants, *Seminole Tribe's* holding that Congress cannot use its Commerce Clause power to abrogate the states' sovereign immunity must also mean that Congress cannot accomplish the same result by forcing constructive waivers of immunity by the states. In support of their position, the defendants rely on two cases that expressed the view that *Seminole Tribe* invalidated the constructive waiver doctrine. *See Chavez v. Arte Publico Press,* 157 F.3d 282, 286-87 (5th Cir. 1998); *Close v. New York,* 125 F.3d 31, 40-41 (2d Cir. 1997).

The Supreme Court's decision in *Seminole Tribe* made clear that Congress has limited constitutional power to abrogate the protection afforded the states by the Eleventh Amendment against litigation in federal court. In *Marie O.,* however, we stated that *Seminole Tribe* left intact the "unremarkable, and completely unrelated [to abrogation], proposition that the States may waive their sovereign immunity." 131 F.3d at 617 (quoting *Seminole Tribe,* 517 U.S. at 65) (internal quotation marks omitted). Our approach is in conformity with the course taken by the majority of circuits in the wake of *Seminole Tribe. See, e.g., Genentech, Inc. v. Regents of Univ. of Cal.,* 143 F.3d 1446, 1453 (Fed. Cir. 1998), *petition for cert. filed,* 67 U.S.L.W. 3337 (U.S. Nov. 3, 1998)

(No. 98-731); *Mills v. Maine,* 118 F.3d 37, 50 (1st Cir. 1997); *Booth v. Maryland,* 112 F.3d 139, 145 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 2063 (1998). In each of these cases, the courts proceeded as if the waiver doctrine survives *Seminole Tribe,* although they did not specifically decide the issue. The Ninth Circuit has considered this issue and decided explicitly that *Seminole Tribe* did not affect the doctrine of implied waiver. *See Premo v. Martin,* 119 F.3d 764, 770 n.2 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 1163 (1998)[3]. Congress may condition a state's receipt of federal funds or participation in a federal program on the state's waiver of its immunity under the Eleventh Amendment, as long as Congress expresses its intent to do so using unmistakably clear language. *See Welch v. Texas Dep't of Highways & Public Transp.,* 483 U.S. 468, 477-78 (1987); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985).

As we noted in *Marie O,* any constructive waiver exacted by the federal government must be based on an "unequivocal indication" of the state's intent to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment. Although the doctrine of constructive waiver was not extinguished by the Supreme Court's decision in *Seminole Tribe,* it is clear that "Congress must express, unambiguously, its intent to impose such a condition on the state." *Marie O.,* 131 F.3d at 617. "By insisting that Congress speak with a clear voice, we enable the States to exer-

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3 *See also* Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 Minn. L. Rev. 793, 809-21 (1998) (arguing that the doctrine of implied waiver remains valid after *Seminole Tribe*).

cise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981).

There is, therefore, a fundamental difference between the sort of abrogation that the Supreme Court found constitutionally objectionable in *Seminole Tribe* and the concept of constructive waiver with which we deal in this case. That difference turns on the voluntariness of the state's choice in the waiver situation--a choice between waiving its immunity or forgoing participation in the federal statutory scheme at issue. When Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives *Seminole Tribe.* We turn now to an application of these principles to the case before us.

2.

The defendants next submit that, even if the doctrine of constructive waiver survives *Seminole Tribe,* there is no waiver of the State's sovereign immunity in this case. In their view, the Telecommunications Act contains no clear and unambiguous expression of Congress' intent to condition states' participation in the regulatory scheme on their consent to suit in federal court. They point out that the Act does not even mention sovereign immunity; nor does it indicate an intent to give states a choice between carrying out their responsibilities under the Act or retaining their sovereign immunity by letting the FCC fulfill their responsibilities. In their view, the absence of these elements from the statutory language negates any possibility of finding a constructive waiver; there is no textual manifestation that Congress

clearly intended to condition the states' participation under the Act on their waiver of sovereign immunity.

We cannot accept this argument. Although the language of the statute might not contain the express waiver language that the defendants seek, the structure of the pertinent section of the statute, notably 47 U.S.C. sec. 252, makes clear that Congress intended to provide for federal court review of any regulatory determinations made under the section, whether by a state commission or by the FCC acting in the place of a state commission. Section 252 first describes the duties of the carriers seeking to enter an interconnection agreement and then details the role of the state commissions in the mediation, arbitration and review process. It sets forth the standards by which the state commissions may impose terms upon the parties to the interconnection agreements during arbitration as well as the standards by which the state commission must approve or reject an agreement. Subsection 252(e)(5) then provides that, if a state commission fails to carry out its responsibilities under sec. 252, the FCC will act in place of the state commission. Subsection 252(e)(6), titled "Review of state commission actions," then provides that the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions. It further provides that any party aggrieved by a state commission's determination under sec. 252 may obtain review "in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and [section 252]." 47 U.S.C. sec. 252(e)(6).

This statutory structure gives each state the option to involve itself in the regulatory scheme or to let the FCC act in

its place. Under the terms of sec. 252, *some* administrative body will exercise regulatory authority over interconnection agreements, and that administrative action, whether taken by a state administrative tribunal or the FCC, is subject to review in federal court. If the reviewing body is a state commission, its actions are reviewable in federal court under 47 U.S.C. sec. 252(e)(6); if the reviewing body is the FCC, its actions are reviewable in federal court under 28 U.S.C. sec. 2342. In short, under the Telecommunications Act, Congress gave states a genuine choice: The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out the federal regulatory functions without their participation. *See* 47 U.S.C. sec. 252(e)(5)-(6). Because this scheme results in a suit against a state entity in federal court only if the state chooses to participate, the statute involves a constructive waiver--not an abrogation--of the Eleventh Amendment and therefore does not run afoul of *Seminole Tribe.*

We are cognizant of the argument that subsections 252(e)(4) and (e)(5) give rise to a possible scenario in which a state's choice to opt out might arguably be less than voluntary. If parties reach an interconnection agreement through private negotiations (without asking a state commission to mediate or arbitrate) *and* the state commission fails to take action to approve or reject the agreement, the Act provides that such an agreement will be "deemed approved." 47 U.S.C. sec. 252(e)(4). When an agreement is "deemed approved" under sec. 252(e)(4), the FCC does not step in to act in place of the state commission. *See* 47 C.F.R. sec. 51.801.

Therefore, in this situation, a state commission arguably must choose between reviewing the agreement (thereby subjecting itself to federal court jurisdiction) or accepting the result that the agreement will go into effect without any regulatory oversight. *See Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 27 F. Supp. 2d 1149, 1158, (W.D. Wis. 1998). Although the voluntariness of a state's choice to opt out of the process is less clear in such a situation, we do not have this problem before us today. Such agreements are at issue in 98-2256, but we have granted Ameritech's motion to dismiss that appeal and to remand that case to the district court for a voluntary dismissal with prejudice. We therefore need not decide--and reserve for another day--whether having a negotiated agreement go into effect without government oversight is the kind of consequence that leaves a state no true choice but to involve itself in the review process. As this case now comes to us, the defendants affirmatively and voluntarily exercised the choice to involve themselves in the arbitration and approval process while fully aware that the Act provides for federal court review of their actions. Given that the plaintiff carriers had requested arbitration, the FCC would have stepped in had Illinois decided to opt out. *See* sec. 252(e)(5). Therefore, Illinois did not face a choice between submitting to review in federal court or letting the agreements be implemented without government oversight. Thus, without deciding whether a state waives its sovereign immunity by reviewing a privately negotiated agreement, we hold today that, on the record before us, the defendants effectively waived their sovereign immunity by choosing to carry out the arbitration and approval functions as provided in sec. 252 of the Telecommunications Act.

In sum, the Act provides state commissions with a realistic and genuine choice whether to involve themselves in the regulatory process when asked to arbitrate and approve interconnection agreements, or whether to let the FCC assume those functions. In this case, the defendants exercised that choice voluntarily by opting to participate in the regulatory scheme and thereby consented to suit in federal court.

Conclusion

We hold that, by electing to assume responsibility for the arbitration contemplated by the Act, the defendants waived the State's immunity from suit in federal court provided by the Eleventh Amendment. Although the wording of the statute does not mention explicitly waiver of sovereign immunity, the structure of the statute, and therefore its operation, make clear that a state's decision to exercise regulatory authority, which would otherwise remain under exclusively federal control, triggers waiver of its sovereign immunity from suit in federal court.4 Accordingly, the judgment of the district court in 98-2127 is affirmed.

AFFIRMED

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4 Because we have decided that the state authorities waived their Eleventh Amendment immunity, we need not address whether the doctrine of *Ex parte Young* affords an alternate basis for holding that the Eleventh Amendment does not bar this action.

APPENDIX C – MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 30, 1998

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 2225

MCI TELECOMUNICATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC. *et al.*,

Defendants.

No. 97 C 4096

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

CENTRAL TELEPHONE COMPANY OF ILLINOIS, *et al.*,

Defendants.

No. 97 C 0886

AT&T COMMUNICATIONS OF ILLINOIS, INC.,

Planitiff,

v.

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, *et al.*,

Defendants.

No. 97 C 8285

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

DAN MILLER, *et al.*,

Defendants.

JUDGE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Pursuant to an order of this court, the above-captioned cases have been determined to be "related." All four of these cases are brought under Section 252 of the Telecommunica-

tions Act of 1996, challenging decisions of the Illinois Commerce Commission in approving interconnection agreements under the Act. Currently pending in three of the cases1 are motions to dismiss filed by defendants, the Illinois Commerce Commission's ("ICC") and the Commissioners of the ICC's ("the Commissioners"), (referred to herein collectively as "the defendants"), pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(2). The defendants argue in their motions that Eleventh Amendment sovereign immunity protects them from suit in these cases.

This memorandum opinion and order also addresses the defendants ICC's and Commissioners' motion to dismiss the counterclaim of defendant Illinois Bell Telephone Company d/b/a Ameritech Illinois filed in *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225. As in their other motions to dismiss discussed in this opinion, ICC and the Commissioners argue that they cannot be made to defend because of Eleventh Amendment immunity.

In *MCI v. Central Telephone,* Case No 97 C 4096, there are no motions filed on this issue. However, on July 21, 1997, this court has granted a stay of the action pending resolution of the ICC's and Commissioners' motions to dismiss filed in *MCI v. Illinois Bell,* Case No. 97 C 2225. In lieu of filing memoranda, the parties agreed to be bound by this court's ruling on the Eleventh Amendment issue.

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1 *MCI v. Illinois Bell,* Case No. 97 C 2225, *AT&T v. Illinois Bell Telephone,* Case No. 97 C 08886, and *Illinois Bell Telephone Company v. Miller,* Case No. 97 C 8284.

For the reasons stated in this memorandum opinion and order, the ICC's and the Commissioners' motions are DENIED.

I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or Telecommunications Act") was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications customers and encourage the rapid deployment of new telecommunications technologies." Act, *Statement of Purpose.* The Act, which amends the Telecommunications Act of 1934, preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251 (c)(2)(D)(1998). Under Sections 251 and 252 of the Act, incumbent local exchange carriers and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. *See* 47 U.S.C. §§ 251(c), 252 (1998).

Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If, however, the state declines to accept the regulatory role detailed in the statute, such duties are assumed by the Federal Communications Commission:

> If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (1998). If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission (or the FCC) for arbitration. See 47 U.S.C. § 252(b)(1) (1998). A final interconnection agreement, whether negotiated or arbitrated, is required to be reviewed by the state commission (or FCC) in order to determine whether it complies with the Act. Specifically, Section 252(e)(1) provides that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement:

> In a case in which the State fails to act as described in paragraph (5), the proceeding by the Commis-

> sion under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section.

47 U.S.C. § 252(e)(6) (1998). In the cases currently under review, the plaintiffs have filed suit under Section 252(e)(6) to seek redress for various provisions of interconnection agreements that were reviewed, arbitrated, and/or approved by the ICC. In *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225, and *AT&T v. Illinois Bell Telephone,* Case No 97 C 0886, the United States of America and the Federal Trade Commission have filed motions to intervene. Those motions have been granted.

II. STANDARDS

The defendants ICC and the Commissioners move to dismiss the plaintiffs' complaints (and a co-defendants counterclaim) under Federal Rules of Evidence 12(b)(1) and 12(b)(2), claiming immunity under the Eleventh Amendment of the United States Constitution. The plaintiffs, co-defendants, and intervenors United States and the Federal Communications Commission ("FCC") have filed motions to in opposition to the ICC's and the Commissioners' motions to dismiss.

A. RULE 12(b)(1)

A motion to dismiss for lack of diversity jurisdiction under Fed.R.Civ.P. 12(b)(1) can be raised at any time. *Alexander v. Allister Const. Co.*, 424 F.Supp.277, 278 (N.D. Ill.1976). When presented with a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the district court must normally accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996) (citing *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993)). Once the jurisdictional allegations have been controverted, it is the plaintiff's burden to come forward with additional evidence to support a claim of jurisdiction. *Seglin v. Esau*, 769 F.2d 1274, 1277 (7th Cir. 1985) (citing *Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.*, 60 F.3d 350 (7th Cir. 1995)).

B. RULE 12b)(2)

Federal Rule of Civil Procedure 12(b)(2) provides that an action should be dismissed if, upon a motion, the court finds that it lacks jurisdiction over the person. Fed.R.Civ.P. 12(b)(2). In order to raise lack of in personam jurisdiction as a defense, the party raising the defense must do so before a responsive pleading is served, or the defense is waived. *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046 (3d Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 193 (1993); 5A Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1351 (1990). Uncontroverted factual allegations are accepted as true for the purposes of such a motion. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed.

Cir. 1993), *cert. denied,* 512 U.S. 1235, 114 S. Ct. 2738 (1994). Where the court's jurisdiction has been controverted, "the party invoking jurisdiction has the burden of supporting the allegations of jurisdictional facts by competent proof." *Grafon Corp. v. Hausermann,* 602 F.2d 781, 783 (7th Cir. 1979) (citation omitted).

C. ELEVENTY AMENDMENT IMMUNITY

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suite in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend XI. "The principle of sovereign immunity has been deeply embedded in our federal system since its inception, and is required because of the sensitive problems inherent in making one sovereign appear against its will in the courts of another." *Welch v. Texas Dept. of Highways and Public Transp.,* 483 U.S. 468, 469, 107 S. Ct. 2941, 2943 (1987). The Eleventh Amendment bar is jurisdictional: "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 98, 104 S. Ct. 900, 906 (1984).

In general, the Eleventh Amendment has been interpreted to ban suits in federal court against unconsenting states. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54, 116 S. Ct. 1114, 1122 (1996); *Pennhurst,* 465 U.S. at 100, 104 S. Ct. at 908. Although on its face the Eleventh Amendment

only prohibits actions brought by out-of-state citizens, a state's protection from suit under the Eleventh Amendment has been interpreted to extend to suits brought in federal court by the state's own citizens. *See e.g., Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504 (1890); *Employees of Dept. of Public Health and Welfare v. Depart. of Public Health and Welfare,* 411 U.S. 279, 93 S. Ct. 1614 (1973). Eleventh Amendment immunity also protects agencies that are arms of the state government. *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 149-50, 101 S. Ct. 1032, 1034 (1981). Nonetheless, Eleventh Amendment immunity is not absolute. Courts have recognized several exceptions to the principle of sovereign immunity.

III. DISCUSSION

ICC and the Commissioners argue in their motions to dismiss that the claims against them are barred by the Eleventh Amendment to the United States Constitution. The various motions filed in opposition to the ICC and the Commissioner's motions to dismiss argue that the facts of the present case fall within recognized exceptions to Eleventh Amendment immunity. In particular, they argue that (1) the ICC and Commissioners have waived their Eleventh Amendment immunity; and, (2) under the doctrine of *Ex parte Young,* 209 U.S. 123, 159-60, 28 S. Ct. 441, 453-54 (1908), the Commissioners cannot claim immunity in a suit claiming prospective relief. This court will examine each argument in turn.

A. WAIVER

By waiving the protections of the Eleventh Amendment, a state or state agency may consent to suit in federal court. *Kroll v. Board of Trustees,* 934 F.2d 904, 907 (7th Cir.), *cert. denied,* 502 U.S. 941, 112 S. Ct. 377 (1991); *Darne v. State of Wisconsin, Department of Revenue,* __ F.3d __, __, 1998 WL 69367, at *2 (7th Cir. Feb. 23, 1998). The Supreme Court has recently reaffirmed that the theory of constructive waiver is a viable doctrine: "a state can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it." *Idaho v. Coeur d'Alene Tribe of Idaho,* __ U.S.__, 117 S. Ct. 2028, 2033 (1997) (Kennedy, J.). *See also Seminole Tribe,* 517 U.S. at __, 116 S. Ct. at 1128 (leaving intact the "unremarkable . . . proposition that the States may waive their sovereign immunity.") A state may effectuate such a waiver "by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n. 1, 105 S. Ct. 3142 at 3145, n. 1 (1985). If a state is found to have waived its immunity, the state may be sued in federal court "even for retroactive relief to be paid out of the state treasury." Erwin Chemerinsky, *Federal Jurisdiction* § 7.6 at 406 (2d ed. 1994) (hereinafter "Chemerinsky").

However, the test for determining whether waiver exists is stringent. *Atascadero,* 473 U.S. at 241, 105 S. Ct. at 3146. Waiver by a state will be found "only where stated by the most express language or 'by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S. Ct. 1347, 1361 (1974) (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171, 29 S. Ct. 458, 464 (1909)).

See also Pennhurst, 451 U.S. at 17, 101 S. Ct. at 1539-40 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

1. Explicit Versus Constructive Waiver

A state's waiver of the Eleventh Amendment may be either explicit or constructive. In order to be explicit, the state must "expressly agree to be sued in federal court." Chemerinsky, §7.6 at 406. Explicit waivers are generally found in state statutes or constitutional provisions that specifically permit suit in federal court. In the cases presently before the court, however, the various parties do not contend that the state has explicitly waived its immunity. Instead, the parties proceed under a theory of constructive waiver.

Constructive waiver is generally found when a state participates in a federal program that conditions funding or participation on consent to jurisdiction. *See Digiore v. State of Illinois,* 962 F. Supp. 1064, 1074 (N.D. Ill. 1997) (finding that "(c)onsent through quid pro quo participation in federal programs amounts to a 'constructive waiver' of immunity") (citation omitted). Constructive waiver is generally disfavored by the courts. *Edelman,* 415 U.S. at 673, 94 S. Ct. at 1360 ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") As a result, constructive waiver is rarely found:

> [C]onstructive waiver of Eleventh Amendment immunity is virtually nonexistent. If it ever will exist, it will be in situations where Congress indicates a clear intent to make states liable in federal court

> if they engage in a particular activity, and then a state voluntarily chooses to engage in that conduct. The congressional desire to make states liable must be in unmistakable language in the statute itself and it must be an area where the state realistically could choose not to engage in the activity.

Chemerinsky, §7.6 at 410 (internal quotation marks and footnotes omitted). Thus, although states can waive their immunity by opting to participate in a federal program, Congress must clearly condition such participation on waiver. *Edelman,* 415 U.S. at 673-74, 94 S. Ct. at 1361; *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 110 S. Ct. 1868 (1990); *Atascadero,* 473 U.S. at 247, 105 S. Ct. at 3149; *Marie O. v. Edgar,* 131 F.3d 610, 617 (7th Cir. 1997). Furthermore, such participation must be voluntary and it must be expressly clear that such participation will require appearance in federal court. *See Edelman,* 415 U.S. at 673, 94 S. Ct. at 1361 ("The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 150, 101 S. Ct. 1032, 1034-45 (1981) (the fact that a state agrees to comply with federal law in conjunction with a federal program is insufficient to waive Eleventh Amendment immunity); *Digiore,* 962 F. Supp. at 1074 (finding that the state cannot be found to have constructively waived immunity by participation in FLSA, in part, because "FLSA is not a voluntary spending program whose benefits the states may decide to accept or reject").

2. Did *Seminole Tribe* Invalidate the Doctrine of Constructive Waiver?

In their motions to dismiss the ICC and Commissioners argue that the Supreme Court's decision in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S. Ct. 1114 (1996), rejected the theory of constructive waiver. For example, in their motion to dismiss the counterclaim agianst them filed in *MCI v. Illinois Bell,* Case No. 97 C 2225, the defendants contend that the doctrine of constructive waiver is inconsistent with *Seminole Tribe.* Mem. at 2. The defendants further claim that "waiver of immunity can only be made in the state's constitution, statutes, or decisions." Mem. at 1.

The defendants' arguments are unpersuasive. First of all, as previously stated, waiver of immunity premised on a state's constitution, statute or decision is generally what is known as explicit waiver. *See Supra,* Part III.A.1. Constructive waiver, however, may be based on factors beyond the state's own constitution or laws. *Id.*

Second, the defendants misread the Court's decision in *Seminole Tribe.* Rather than reject the principle of waiver, as the defendants contend, the Court in *Seminole Tribe* explicitly reaffirmed the "proposition that the States may waive their sovereign immunity." 517 U.S. at 63, 116 S. Ct. at 1128. The *Seminole Tribe* decision, however, did not focus on the concept of waiver at all. Rather, that opinion addressed the proper standard to determine whether Congress can and has abrogated the States' sovereign immunity. *Id.,* 517 U.S. at 55, 116 S. Ct. at 1123. Congress' ability to abrogate sovereign immunity is, as the Supreme Court explained, is "unremarkable and completely unrelated" to the doctrine

of waiver. *Id.*, 517 U.S. at 63, 116 S. Ct. at 1128. As the Supreme Court clarified even more recently in *Coeur d'Alene Tribe,* the Eleventh Amendment "enacts a sovereign immunity from suit, rather that a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." __ U.S. at __, 117 S. Ct. at 2033.

Among other cases, the defendants cite a recent district court decision from the Northern District of Illinois, *Digiore v. State of Illinois,* 962 F. Supp. 1064 (N. D. Ill. 1997) (Castillo, J.) in support of their argument that jurisdiction based on constructive waiver may not be found after *Seminole Tribe.* In *Digiore,* the court found that the Eleventh Amendment protected the state of Illinois from suit by a group of Illinois police officers for violations of overtime and pay in violation in the Fair Labor Standards Act. *Id.* at 1074. Although the defendants are correct that *Digiore* acknowledged the "tight restrictions" placed on "congressional power to eradicate immunity" by *Seminole Tribe,* they forget to mention that the court in *Digiiore* specifically acknowledged the "narrow exception" of constructive waiver, *Id.* at 1076, which applies "where the state, with full knowledge that it faces federal court liability, nonetheless chooses to engage in the activity regulated by the federal program, " *Id.* at 1074 (citing *Atascadero,* 473 U.S. at 247, 105 S. Ct. at 2149-50; *Parden v. Terminal Ry. of Alabama State Docks Dept.,* 377 U.S. 184, 191, 84 S. Ct. 1207, 1212 (1964)).

Just last month, in a decision applying the Supreme Court's decision in *Seminole Tribe* to the concept of Eleventh Amendment sovereign immunity, the Seventh Circuit affirmed that there are three different exceptions to state immunity:

> First, suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment. Second, individuals may sue directly a state when Congress has abrogated the immunity in unequivocal terms and pursuant to a valid exercise of its own power. Finally, a suit may be brought against a state directly when a state has waived its immunity and validly consented to suit in federal court.

Darne v. State of Wisconsin Department of Revenue. __ F.3d __, 1998 WL 69367, at *2 (7th Cir. Feb.23, 1998) (citing *Marie O.*, 131 F.3d at 615). Thus, the limitations that *Seminole Tribe* placed on the ability of Congress to abrogate a state's sovereign immunity is entirely independent from the well-established exception to Eleventh Amendment immunity know as waiver. *See also Moores Federal Practice 3d* §§ 123.22 - 123.21 (1997) (discussing in separate sections (1) the power of Congress to abrogate the states' Eleventh Amendment immunity in certain circumstances and (2) the fact that a state may explicitly or constructively waive its Eleventh Amendment sovereign immunity); Kit Kinsports, *Implied Waiver After Seminole Tribe,* 82 Minn. L. Rev. 793, 807 (1998) (arguing that the doctrines of implied waiver and abrogation are two distinct concepts). The defendants' arguments that the doctrine of constructive waiver does not exist is unsupported and misconstrues the current state of the law.

3. Conclusion

A careful analysis of the cases presently before the court reveals that the state's actions in these cases constitute a con-

structive waiver, and thus falls within this narrow exception to immunity. The ICC and the Commissioners voluntarily agreed to arbitrate the agreements in question. Instead of allowing the agreements to be arbitrated by the FCC pursuant to Section 252(e)(5) of the Act, the state *voluntarily* participated in the regulatory scheme:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding of other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding . . . and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (1998). Furthermore, Congress made it expressly clear that participation in the regulatory scheme requires review in federal court:

> [A]ny judicial review of the Commission's actions shall be the exclusive remedies for a State commissioner's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court . . .

47 U.S.C. § 252(e)(6) (1998). The interconnection agreements in question are exclusively reviewable in federal court under Section 252(e)(6). *See Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 803 (8th Cir. 1997), *cert granted, AT & T Corp. v. Iowa Utilities Bd.*, __ U.S. __, 118 S. Ct. 879 (Jan.

26, 1998) ("We afford subsection 252(e)(6) our traditional presumption and conclude that it is the *exclusive* means to attain review of state commission determination under the Act.") (emphasis added).

There can be no other reasonable interpretation of state's actions in this case: By participating voluntarily in the regulatory scheme, they have consented to suit in this court. The state participated in the arbitration process with full knowledge that Section 252(e)(6) provides for federal review of agency action and, pursuant to Section 252(e)(4), no state court may review such determinations. The state was also aware that if they had decided to not carry out the functions detailed in Section 252, the federal government would have performed the role. The language of the Act is clear and open to no other interpretation. Had the state declined to participate in the non-obligatory federal program, it would have preserved its sovereign immunity.2

A district court in the Western District of Washington recently decided a similar case involving whether the state and waived its Eleventh Amendment immunity in case brought pursuant to the Telecommunications Act of 1996:

> The "overwhelming implication" of this statutory structure is that Congress conditioned state partici-

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2 The defendants do not directly argue in the briefs that their participation in the regulatory scheme was somehow involuntary or that they never "consented" to the application of the Act or its mandatory federal review scheme. Defendants also do not contend that the act(s) of arbitrating was performed independently of the regime set forth in Section 252.

> pation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted -- but not required -- to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is "no room for any other reasonable construction" of the statute. By participating in the arbitration and approval process, [the state] consented to review of its actions.

U.S. West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997). Other courts that have examined this issue to date are in agreement that voluntary participation by the state in the federal telecommunications scheme outlined in Section 252 constitutes a waiver of Eleventh Amendment immunity. *See e.g., U.S. West Communications, Inc. v. Thoms*, No. 4-97-CV-70082, slip op. at 5 (S.D. Iowa Aug. 4, 1997) (hereinafter "*Thoms*") ("By choosing to participate in the arbitration and approval scheme notwithstanding the express provision for exclusive federal jurisdiction, Iowa waived any claim of Eleventh Amendment immunity."); *U.S. West Communications, Inc. v. Reinbold*, No. A1-97-25, slip op. at 8 (D.N.D. July 28, 1997) (hereinafter "*Reinbold*") ("Upon deciding to regulate under the Act, the State agency consents to review of its actions in federal court."); *Bell South Telecommunications, Inc. v. Tennessee Regulatory Authority, et al.*, No. 3:97-0523, slip op. at 12 (M.D. Tenn. Jan. 29, 1998) (hereinafter "*Tennessee Regulatory*") ("[S]tates cannot be allowed to circumvent federal law which calls for a waiver of immunity by invoking state law

barriers."); *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc. et al.*, No. 5:97-CV-405-BR, slip op. At 10-11 (E.D. N.C. Nov. 20, 1997) (hereinafter "*AT&T v. BellSouth*") (finding that the state, "by its voluntary involvement in the consummation of the interconnection agreements, waived its Eleventh Amendment immunity").

This court hereby finds that the clear intention of Congress was to require review by federal courts of any arbitration or approval of interconnection agreements made pursuant to the Act. By deciding to participate in the arbitration and approval processes, the ICC and the Commissioners have subjected themselves voluntarily to suit in federal court. Accordingly, their motion to dismiss the complaint due to Eleventh Amendment immunity is denied.

B. *EX PARTE YOUNG*

Although this court has found that the doctrine of waiver prohibits ICC and the Commissioners from defending these suits on the basis of Eleventh Amendment immunity, there is an alternate basis for finding that the Commissioners are not protected by the Eleventh Amendment in this instance: the doctrine of *Ex parte Young. See Ex Parte Young,* 209 U.S.123, 28 S. Ct. 441 (1908). In the *Young* decision, the Supreme Court found that federal courts have jurisdiction over a suit against a state officer for injunctive relief of ongoing violations of federal law, even if the state is protected by Eleventh Amendment immunity. *See id.* "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States."

Pennhurst, 465 U.S. at 105, 104 S. Ct. at 910 (internal citations omitted).

1. Type of Relief Sought

The defendants argue that the *Ex parte Young* doctrine does not apply in the cases currently under review because the type of relief sought by the plaintiffs is retrospective. "[O]fficial-capacity suits for retrospective relief -- i.e., money damages payable from the state treasury -- generally implicate the Eleventh Amendment in the absence of a waiver by the state or a valid congressional override." *Kroll,* 934 F.2d at 907-08 (citing *Quern v. Jordan,* 440 U.S. 332, 99 S. Ct. 1139 (1979)). *See also Edelman,* 415 U.S. at 668, 94 S. Ct. at 1358; *Green v. Mansour,* 474 US.S. 64, 68-69, 106 S. Ct. 423, 425-426 (1985).

However, officials may only be sued in their official capacities for injunctions contemplating prospective relief. *MSA Realty Corp. v. State of Illinois,* 990 F.2d 288, 291 (7th Cir. 1993); *Edelman,* 415 U.S. at 662-665, 94 S. Ct. at 1355-56. *See also Kroll,* 934 F.2d at 908 (finding that the Eleventh Amendment does not bar suits against state officials in their official-capacity if the suit is for prospective relief); *Darne,* 1998 WL 69367 at *2 ("[S]uits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment.") Prospective relief includes relief such as "an injunction or a declaratory judgment and monetary damages that are 'ancillary' to either." *Kroll,* 934 F.2d at 908. *See also Coeur d'Alene Tribe,* __ U.S. at __, 117 S. Ct. at 2043 (O'Connor, J., concurring in part) ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a

claim can ordinarily proceed in federal court.") (internal citations omitted).

Accordingly to ICC and the Commissioners, the plaintiffs' request that the court review the agreements and determine whether the ICC violated federal law is not prospective: "[F]or a court to determine whether the agreement meets the requirements of the Act . . . [and] to reform the agreement to comply with federal law on an ongoing basis, would necessarily involve looking to past, completed conduct by the Commission." Reply Mem. at 18 filed in *MCI v. Illinois Bell*, Case No. 97 C 2225. According to the defendants such an action is retrospective because the "arbitration and approval process is over." *Id.* at 19.

Contrary to the defendants' assertions, the relief that the plaintiffs seek in the cases currently under review is prospective. The plaintiffs request judicial review of whether the ICC's determinations comport with the requirements of the Act and injunctive relief to redress any ongoing violations of federal law. To the extent that the state is continuing to engage in arbitration and review of interconnection agreements, their alleged violations of the Act are ongoing. Furthermore, none of the plaintiffs seek money damages, which would clearly be barred under the doctrine of *Ex parte Young*. Carried to its logical end, the defendants' argument would allow the state to continue to violate federal law while denying the plaintiffs any recourse in federal court because the review would include scrutiny of past acts. *See Thoms*, slip op. at 4 (rejecting the state's argument that a complaint filed pursuant to Section 252 of the Telecommunications Act seeks retrospective review of the state's actions). Accordingly, this court finds that the relief requested by the plain-

tiffs -- in injunction or declaration requiring the Commissioners to follow the Act in making their regulatory decisions -- is undeniably prospective and within the meaning of the *Ex parte Young* exception.

Must the Complaints Include an Allegation that the Commissioners violated the Constitution?

The defendants next argue that the plaintiffs suit must fail in those cases where the plaintiffs do not allege a violation of the Constitution: "*Ex parte Young* is concerned with violations of the Constitution, not with alleged misapplication of federal law" Reply Mem. at 12, *Illinois Bell v. Miller,* Case No. 97 C 8285. *See also* Reply Mem. at 10-17, *MCI v. Illinois Bell,* Case No. 97 C 2225. While it may be true that alleging a constitutional violation will weigh against state sovereignty and in favor of review of the particular case in federal court, alleging a constitutional violation is not a requirement to proceeding under the doctrine of *Ex parte Young. See Coeur d'Alene,* 117 S. Ct. at 2039 (Kennedy, J., with Rehnquist, C.J.) (stating that a violation of the Constitution offers "a powerful reason to provide a federal forum").

The Supreme Court has repeatedly emphasized that the *Young* doctrine is premised on the concept of "the need to promote the vindication of federal rights." *Pennhurst,* 465 U.S. at 105, 104 S. Ct. at 910 (citation omitted). Thus, although claims brought under the *Young* rule may involved constitutional issues, a constitutional claim is not required in order to proceed. For example, in a recent case decided by the Seventh Circuit, *Marie O. v. Jim,* 131 F.3d 610, 617 (7th Cir. 1997), an action brought to vindicate rights under a federal law was found to fall squarely within the doctrine of *Ex*

parte Young. In *Marie O.*, a group of infants with disabilities filed a class action suit against the State of Illinois alleging that the state was not complying with the Individuals with Disabilities Education Act ("IDEA"). *Id.* at 611. The Seventh Circuit upheld the claim under the *Young* rule, finding that a suit against the state "seeking to enforce compliance with the federal program under which they have accepted funds is cognizable under the *Ex parte Young* doctrine." *Id.* at 617.

This court rejects any argument that the plaintiffs must include a constitutional claim in their complaints in order to proceed under *Ex parte Young.*

3. Effect of *Seminole Tribe* on the *Young* Doctrine

The Supreme Court has recently written two major opinions addressing the subject of Eleventh Amendment Sovereign immunity, *Seminole Tribe* and *Coeur d'Alene.* As both of these decisions have impacted the scope of the *Ex parte Young* doctrine it is necessary to address them here.3

In *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. 1114, the Seminole Tribe of Indians sued the Governor and the state of Florida, alleging a violation of the Indian Gaming Regulatory Act ("IGRA"). The IGRA statute required states to negotiate in "good faith" with Indian tribes for formation of a compact regulating gambling activities. If the state failed to negotiate in good faith as required by the Act, sanctions followed. In applying the *Young* doctrine to the remedial scheme outlined in the IGRA, the Court explained that the

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3 *Coeur d'Alene* will be discussed in the following subsection, *see infra* Part III.B.4.

fact that the Act included a specific and "modest set of sanctions" weighed against application of the *Ex parte Young* doctrine *Id.* at 75, 116 S. Ct. at 1133. In such a case, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court" rather than the modest sanctions outlined in the IGRA. *Id.*

Writing for the court, Chief Justice Rehnquist limited the reach of the *Ex parte Young* doctrine by finding that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting action against a state officer based upon *Ex parte Young*." *Id.* at 74, 116 S. Ct. at 1132. The Court emphasized, however, that their ruling does not prohibit Congress from authorizing "federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme." *Id.* at 75, n. 17, 116 S. Ct. at 1133, n. 17.

The instant case, however, is significantly different from *Seminole Tribe*. In contrast to the IGRA, the Telecommunications Act does not incorporate a "detailed remedial scheme" that would limit the type of remedies that a district court could prescribe in such a case. In fact, the only direction that the Act gives the court is that the court shall "determine whether the agreement or statement meets the requirements of section 251." 42 U.S.C. § 252(e)(6) (1998). Several courts that have already examined the effect of *Seminole Tribe* on actions brought against state officers under the Telecommunications Act have found that such an action may proceed despite the tightening of the *Young* doctrine presented in *Seminole Tribe*. *See, e.g., Thoms*, slip

op. at 4; *AT&T v. BellSouth,* slip op at 12. In addition, the remedial scheme contemplated in *Seminole Tribe* is different from the one currently under review because the IGRA *required* the state to take action, whereas the Telecommunications Act is an *optional* remedial scheme that allows states to decide whether to participate in it. As one court recently found:

> This kind of provision [in Section 252 of the Telecommunications Act] is distinct from the one at issue in the IGRA [in *Seminole Tribe*] which required the state itself to be a party to a compact with an Indian tribe, and to submit to arbitration if it failed to comply. The 1996 Act does not force the State to act affirmatively, nor does it punish the State for refusing to do so. Quite the contrary, the Act gives States the *option* of arbitrating interconnection agreements, but also gives the parties to such an agreement an alternative forum for arbitration if the State chooses not to become involved.

BellSouth, slip op. at 15 (emphasis in the original). This court therefore concludes that the Supreme Court's decision in *Seminole Tribe* does not preclude application of the *Ex parte Young* doctrine in the present case.

4. *Idaho v. Coeur d'Alene Tribe* and the *Young* doctrine

A second recent Supreme Court case, *Idaho v. Coeur d'Alene Tribe of Idaho,* __ U.S. __, 117 S. Ct. 2028 (1997), again reaffirmed the *Ex parte Young* doctrine: "The Court does not question the continuing validity of the *Young* doctrine." *Id.* at __, 117 S. Ct. at 2030. Nonetheless, the opinion

did carve out a new exception to *Young* which is necessary to address here. In *Coeur d'Alene Tribe* the Court rejected the application of the *Young* doctrine to a claim brought by an Indian tribe for injunctive relief against continuing state regulation of lands to which the tribe claimed title. In their suit, the members of the Indian tribe requested injunctive relief that would bar the State's principal officers from controlling certain disputed lands and waters. *Id.* at __, 117 S. Ct. at 2040.

Writing for the Court, Justice Kennedy explained that an interpretation of *Young* that would allow "federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought . . . would be to adhere to an empty formalism. . ." *Id.* at __, 117 S. Ct. at 2034. In a section of the opinion joined only by Chief Justice Rehnquist, Justice Kennedy introduced a sort of balancing test that courts should use to determine where the *Young* doctrine applies. First, courts should determine whether there is an available state forum for vindicating federal interests. *Id.* at __, 117 S. Ct. at 2035. In situations where there is no state forum available, the *Young* rule takes on a "special significance." *Id.* Second, courts should consider whether the case in question requires interpretation of federal law. *Id.* at __, 117 S. Ct. at 2036. According to this new balancing test, review must occur on a case-by-case basis in order to determine whether the presumption in favor of federal court jurisdiction controls. *Id.* at __, 117 S. Ct. at 2038. *But see Id.* at __, 117 S. Ct. at 2047 (O'Connor J., concurring in part, joined by Scalia, J. and Thomas, J.) (arguing that the appropriate review under *Young* remains "a straightforward inquiry into whether a complaint alleges an ongoing violation

of federal law and seeks relief properly characterized as prospective").

Justice Kennedy, writing for a majority of the court, concluded that the Indian tribe's suit was barred by the Eleventh Amendment. *Id.* at __, 117 S. Ct. at 2043. Although the suit could be viewed as one seeking prospective relief, the case presents "special circumstances" where "[t]he dignity and status of statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.*

Analysis of the present case in the context of the Court's decision in *Coeur d'Alene* thus requires an examination of whether there no state forum is available and whether the case involves interpretation federal law. The answer to both of these questions is yes. As discussed in Part I of this opinion, the Telecommunications Act makes clear that the interconnection agreements in question are exclusively reviewable in federal court under Section 252(3)(6). The Act further provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 42 U.S.C. § 252(e)(4) (1998). The Eighth Circuit recently affirmed this interpretation of the Act, finding that Section 252(3)(6) outlines the "exclusive means to attain review of state commission determinations under the Act." *Iowa Utilities Bd.*, 120 F.3d at 803.

Furthermore, the issues at hand clearly concern interpretation of federal law. The issues under review in the present cases are not as central to sovereign immunity as the issues presented in *Coeur d'Alene.* Indeed, in *Coeur d'Alene* the

issue the Tribe asked the federal court to review was that State's control over lands and waters "long deemed by the State to be an integral part of its territory." *Coeur d'Alene*, __ at __, 117 S. Ct. at 2040. In sharp contrast, the plaintiffs in the cases currently under consideration merely ask the federal court to review the interconnection agreements to determine whether they comply with a federal law. Clearly, the issues of sovereign immunity presented by review of state actions taken pursuant to the Telecommunications Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory.

Thus, although the court in *Coeur d'Alene* has created a new exception to the traditional conception of the *Young* doctrine, this exception is narrow and does not preclude application of the doctrine to the present cases.

5. Conclusion

As far as this court is aware, all of the other courts that have examined this issue to date have found that individual directors may be subject to liability under the doctrine of *Ex parte Young*. *See, e.g., Thoms*, slip op. at 4 ("*Ex parte Young* allows this suit to proceed against the Board members in their official capacities."); *Reinbold*, slip op. at 7 ("The Eleventh Amendment is not a bar to U.S. West's suit against the individual PSC members for prospective relief."); *Tennessee Regulatory*, slip op. at 13 ("[T]he court is convinced that the principles of *Ex parte Young* permit an action against the TRA directors."); *AT&T v. BellSouth*, slip op. at 13 (terming the action brought under Section 252 of the Act a

"garden variety" application of the doctrine of *Ex parte Young*).

This court concludes that the doctrine of *Ex parte Young* allows these four suits (and counterclaim) to proceed against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief. The plaintiffs in these cases do not seek money damages from the state, which is the traditional basis for Eleventh Amendment concern. Rather, the plaintiffs asks the court to review the interconnection agreements so that they will comply with federal law on an ongoing basis. Furthermore, the modifications of the *Ex parte Young* doctrine introduced in *Coeur d'Alene* do not alter this court's findings that the plaintiffs' claims fall within the doctrine of *Ex parte Young* because the plaintiffs' claims involve an interpretation of federal law, there is no available state forum, and the plaintiffs' claims do not threaten a central tenant of sovereignty.

C. CONGRESS DID NOT INTEND FOR STATES TO BE PARTIES IN FEDERAL DISTRICT COURT

The defendants' final argument that they should not be required to be a party to the suits in question is that "[a]s a matter of statutory interpretation, Congress did not intend for state commissions that participate in Section 252 to be parties in federal court." Reply Mem. at 8-9, filed in *Illinois Bell v. Miller,* Case No. 97 C 8285. *See also* Reply Mem. at 7-9, filed in *MCI v. Illinois Bell,* Case No. 97 C 2225. According to the defendants' theory, Section 252 of the Act demonstrates that Congress only intended for the *agreement* itself to be reviewable in federal court, not the state commissions'

actions. Reply Mem. at 10, filed in *Illinois Bell v. Miller*, Case No. 97 C 8285.

In making their argument, the defendants point to the fact that Section 252(e)(4) uses the word "actions," ("No State court shall have jurisdiction to review the *action* of a State commission in approving or rejecting an agreement") (emphasis added), whereas Section 252(e)(6) uses the word "agreement," ("Any party aggrieved by [the state commission's determination] . . . may bring an action in an appropriate Federal district court to determine whether the *agreement* or statement meets the requirements of [the Act].") (emphasis added). Accordingly, the defendants conclude, "Section 252(e)(6) evinces a recognition by Congress of the State's sovereignty." *Id.* at 11.

The ICC's and Commissioner's analysis of Congress's intent evades logic. Not surprisingly, the defendants are unable to point to any legislative history that would support their argument that Congress did not intend the state to be a party to a federal court's review of the agreement. While it is true that the language of the Act provides that the federal court may review the "agreement" to see if it complies with the Act, it does not in any way recognize that the state is immune from defending such suits. In fact, the very section that provides for exclusive review of the agreements in federal courts is entitled "Review of State Commissions *Actions*." 42 U.S.C. § 252(e)(6) (emphasis added). If the state agencies elect to participate in the federal regulatory scheme, they are subject to the direction of the Congress and the federal courts in carrying out their roles.

IV. CONCLUSION

This court finds that the ICC and the Commissioners have waived any claim to immunity by voluntarily participating in the regulatory scheme outlined in the Telecommunications Act. Furthermore, as to the Commissioners, this court finds that the doctrine of *Ex parte Young* provides an independent basis of liability.

WHEREFORE, the defendants ICC's and Commissioners' motions to dismiss the plaintiffs complaint on the basis of Eleventh Amendment immunity are DENIED in *MCI v. Illinois Bell Telephone,* Case No 97 C 2225; *AT&T v. Illinois Bell Telephone,* Case No. 97 C 0886; and *Illinois Bell Telephone v. Dan Miller, et al.,* Case No 97 C 8285. The parties in *MCI v. Central Telephone,* Case No. 97 C 4096, are ordered bound by the court's ruling in this memorandum opinion. In addition, the defendants ICC's and Commissioners' motion to dismiss the counterclaim of defendant Illinois Bell Telephone Company d/b/a Ameritech Illinois filed in *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225, is DENIED.

Enter:

_____

David H. Coar
United States District Judge

Dated: March 30, 1998

APPENDIX D – CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS

1. The Commerce Clause, U.S. art. I, § 8 cl. 3

> The Congress shall have Power…to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. The Spending Clause, U.S. art, I, § 8 cl. 1

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

3. The Supremacy Clause, U.S. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. U.S. Const amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate

in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on

which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unre-

solved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recov-

ery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section

251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

* * *

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

* * *

(2) Grounds for rejection. The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to re-

view the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

* * *

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an

extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

* * *

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

Section 601 of the Telecommunications Act of 1996:

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

* * * *

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

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Nos. 00-653 and 00-744

IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

WISCONSIN BELL, INC., d/b/a
AMERITECH WISCONSIN, *et al.*,
Respondents.

ILLINOIS COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TCG MILWAUKEE, INC., AND TIME WARNER TELECOM OF WISCONSIN, L.P.

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Rule 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services, Inc., state as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Transmission Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, inc., is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

Pursuant to Rule 29.6, respondent TCG Milwaukee, Inc. states as follows:

TCG Milwaukee, Inc., is a wholly owned subsidiary of Teleport Communications Group Inc., which in turn is a wholly owned subsidiary of AT&T Corporation. No publicly held corporation owns 10% or more of AT&T Corporation's stock.

Pursuant to Rule 29.6, respondent Time Warner Communications of Milwaukee, L.P. states as follows:

Time Warner Communications of Milwaukee, L.P., now known as Time Warner Telecom of Wisconsin, L.P. is substantially owned by Time Warner Telecom, Inc. Time Warner Telecom, Inc. is an affiliate of Time Warner, Inc. Time

Warner, inc. is a publicly traded company on the New York Stock Exchange under the symbol "TWX".

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STATEMENT

Petitioners – the Public Service Commission of Wisconsin ("PSCW") and its individual commissioners in their official capacities and the Illinois Commerce Commission ("ICC") and its individual commissioners in their official capacities – ask the Court to determine whether the Eleventh Amendment bars federal courts from undertaking the review of state public utility commission actions that is expressly authorized by the Telecommunications Act of 1996[1] ("the Act" or "the 1996 Act"). Specifically, section 252(e)(6) of the Act provides that if state commissions agree to participate in the administration of a new federal scheme governing "interconnection" arrangements among competing local phone companies, their actions may be reviewed for compliance with the Act in federal district court. Petitioners did choose to participate, but then asserted an Eleventh Amendment defense to the ensuing federal lawsuits. The Seventh Circuit, in a ruling consistent with all comparable cases from other circuits, affirmed the rejection of the Eleventh Amendment immunity claim, relying both on waiver and on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

1. Statutory Scheme

The 1996 Act fundamentally altered the balance between federal and state authority in one area of telecommunications regulation. Seeking to introduce competition to local telephone service, Congress partially supplanted the existing system of exclusive state regulation, imposing a new set of federal standards and

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[1] Codified at 47 U.S.C. § 151 *et seq.*

procedures governing "interconnection" between incumbent local companies and potential competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

In the Act, Congress preempted all state laws erecting barriers to entry into telecommunications markets. § 253(a). Then it created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new entrants on an unbundled basis. § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. § 251(c)(4). In each case, Congress prescribed specific federal standards governing the rates that the respective carriers charge each other for these services. §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. 525 U.S. at 377-84 & n.5; § 201(b).

In the spirit of cooperative federalism, Congress also carved out a new, voluntary role for states. The Act requires incumbent local carriers to negotiate with new entrants to develop "interconnection agreements" specifying the terms of interconnection, access to network elements, and resale. § 251(c)(1). If the parties cannot arrive at a complete interconnection agreement through negotiation, however, the Act gives state utility

commissions the authority (if they choose to exercise it) to convene compulsory "arbitrations" at the request of a party to set terms by applying the substantive provisions of the Act and the FCC's regulations. § 252(b), (c). Whether negotiated or arbitrated, the final interconnection agreement must be submitted for review to determine whether it complies with the Act – with the state commissions reviewing the agreement if they choose to do so. § 252(e)(1).

The Act also provides that the local incumbent carrier may "prepare and file with a State commission a statement of the terms and conditions" that the incumbent "generally offers" to new entrants in the state. § 252(f)(1). In order to be approved by the state commission, these "Statements of Generally Available Terms" ("SGATs") must also be reviewed to ensure compliance with the Act. § 252(f)(2). Significantly, the submission or approval of an SGAT does "not relieve" a local incumbent carrier of "its duty to negotiate the terms and conditions" of interconnection pursuant to § 251. § 252(f)(5).

The Act does not require state commissions to implement the new federal scheme. If a state commission declines to exercise the authority offered to it by the Act, the FCC will assume those duties. § 252(e)(5). Whether carried out by the FCC or a state commission, however, final agency determinations regarding the terms of an interconnection agreement are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251" and § 252(e)(6). Federal jurisdiction is exclusive. § 252(e)(4)

("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section [252]"). Determinations of the FCC are reviewed by a federal court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1). *See* § 252(e)(6) (providing for "judicial review of the [FCC's] actions" when it assumes state commission's duties under 1996 Act).

2. The Illinois Litigation

a. *ICC Proceedings*. The ICC petitioners' request for review stems from the ICC's voluntary decision to participate in the Act's arbitration and approval process. MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services, Inc. ("MCI") entered into negotiations over an interconnection agreement with Illinois Bell Telephone Cos., d/b/a Ameritech Illinois ("Ameritech Illinois"). When no final agreement was reached voluntarily, the ICC agreed to arbitrate the disputes and ultimately approved an agreement. Dissatisfied with the ICC's actions, MCI filed suit in the federal court against Ameritech Illinois, the ICC, and the individual commissioners in their official capacities (collectively, the "ICC defendants"). Ameritech Illinois then filed a cross-claim challenging various other aspects of the ICC's determinations. The ICC defendants moved to dismiss these claims, asserting sovereign immunity under the Eleventh Amendment.

b. *District Court Proceedings*. The district court denied the motions to dismiss. ICC Pet. App. 74a-104a. It first ruled that "Congress made it expressly clear that participation in the [Act's] regulatory scheme requires review in federal court," and that "[b]y participating

voluntarily in the regulatory scheme, [the ICC defendants] have consented to suit." *Id.* at 89a-90a. The court also held that, even absent consent, "the doctrine of *Ex parte Young* allows these [claims] to proceed against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief." *Id.* at 102a.

c. *Initial Appellate Proceedings.* The ICC defendants took an interlocutory appeal and, in an opinion issued on February 10, 1999 and amended on June 23, 1999, the Seventh Circuit affirmed the Illinois district court's rejection of the Eleventh Amendment defense. *Id.* at 55a-73a.[2] It held that "by electing to assume responsibility for the arbitration contemplated by the Act, the defendants waived the State's immunity from suit in federal court," because the Act makes it sufficiently clear that such participation waives the state's immunity. *Id.* at 73a.

Soon thereafter, however, this Court issued its ruling in *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board*, 527 U.S. 666 (1999), addressing waiver of the Eleventh Amendment. The Seventh Circuit granted rehearing and asked for briefing on the effect of *College Savings.*

3. The Wisconsin Litigation

a. PSCW Proceedings. The Wisconsin portion of these consolidated cases actually involves three separate

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[2] The Illinois appeal originally included two other cases in which the plaintiffs were AT&T Communications and Ameritech Illinois. Those cases, however, were voluntarily dismissed. *See* ICC Pet. App. 57a nn.1-2.

federal cases. In the first, the PSCW had interpreted and enforced two previously approved interconnection agreements -- one between Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("Ameritech Wisconsin") and TCG Milwaukee, Inc. ("TCG" or "AT&T"), and the other between Ameritech Wisconsin and Time Warner Telecom of Wisconsin, L.P. ("Time Warner"). Ameritech Wisconsin disagreed with the PSCW's actions and brought suit in federal district court, naming as defendants TCG, Time Warner, and the PSCW and the individual commissioners in their official capacities (collectively, the "PSCW defendants").

The second case concerns the PSCW's determinations relating to an SGAT filed by Ameritech Wisconsin. *See* p. 3 *supra* (describing SGATs). The PSCW chose to review this filing, and several new entrants opposed aspects of the proposed SGAT in the proceedings before the PSCW. The PSCW adopted the positions of the new entrants, requiring Ameritech to modify its SGAT to comply with the Act. Ameritech Wisconsin sought review of that decision in a suit in the federal district court against the PSCW defendants. Three new entrants, AT&T, MCI, and US Xchange, sought to intervene in that action as defendants, explaining that they would be adversely affected by any decision overturning the PSCW's SGAT determination. The district court denied the intervention motions on the grounds that the new entrants' interests were adequately presented by the PSCW.

The third case involves the PSCW's determinations in arbitrating and approving a single interconnection agreement between Ameritech Wisconsin and MCI. The PSCW opted to approve a final Ameritech/MCI

interconnection agreement pursuant to § 252. Believing they were aggrieved by some of the PSCW's actions, Ameritech Wisconsin and MCI sued each other and the PSCW defendants in federal district court.

The district court consolidated the three suits, and the United States intervened. In each of the cases, the PSCW and the PSCW defendants filed motions to dismiss under the Eleventh Amendment.

b. *District Court Proceedings.* The district court reviewed all three motions together. PSCW Pet. App. 49a-76a. The court ruled that the PSCW defendants are immune from § 252(e)(6) suits under the Eleventh Amendment. First, the court explained that the Commerce Clause does not give Congress the power to abrogate Eleventh Amendment immunity. *Id.* at 58a-59a. Second, the court found that the PSCW had not waived its Eleventh Amendment immunity by choosing to help administer the Act. *Id.* at 59a-67a. Although the court found that the Act makes clear that a state that participates in the Act's administration will be subject to federal court jurisdiction, *id.* at 60a-61a, the court concluded that no proper waiver follows therefrom because state participation in the Act's administration is not voluntary. *Id.* at 65a-67a. Third, the court ruled that applying the doctrine of *Ex parte Young* to these suits would improperly supplant the specific judicial remedy created by Congress in § 252(e)(6). *Id.* at 68a-73a. Finally, in order to determine whether its Eleventh Amendment ruling required dismissal of these cases in their entirety, the court ordered the parties to brief whether the cases could continue without joinder of the PSCW defendants. *Id.* at 75a.

By the time the district court issued its second decision on whether the cases could proceed without the PSCW defendants, PSCW Pet. App. 77a-94a, the Seventh Circuit had issued its 1999 opinion in the Illinois case holding that a state waives the Eleventh Amendment by choosing to administer the Act. *See* ICC Pet. App. 55a-73a. In addition, this Court had issued its ruling in *College Savings*. Relying on the latter, the district court declined to alter its prior ruling, holding that *College Savings* had fatally undermined the Seventh Circuit's waiver analysis. PSCW Pet. App. 85a-86a. The district court also reiterated its finding that *Ex parte Young*, 209 U.S. 123 (1908), did not apply. PSCW Pet. App. 88a. Finally, having found that "the state commission is required for jurisdiction" under § 252(e)(6), the court held that the suits could not continue in the PSCW defendants' absence. PSCW Pet. App. 89a-93a. The court accordingly dismissed all of the suits for lack of subject-matter jurisdiction. *Id.* at 93a.

4. The Ruling Below

The Illinois appeal, on rehearing, was consolidated with respondents' initial appeals in the Wisconsin case. On July 24, 2000, the Seventh Circuit issued a decision affirming the Illinois court's rejection of Eleventh Amendment immunity and reversing the dismissal of the Wisconsin cases. PSCW Pet. App. 48a. First, it held that, while there are "boundaries for congressional attempts to obtain waivers from states," the waivers obtained from states that choose to participate in the Act's regulatory scheme were proper. *Id.* at 31a. It explained that Congress clearly "intended to provide for federal court review of any regulatory determination made under" § 252, *id.* at 33a, and that states that voluntarily accept

Congress's invitation to be a "'deputized' federal regulator" under § 252 cannot subsequently claim that their authority to regulate originates in "their own sovereign authority." *Id.* at 37a.

In so doing, the Seventh Circuit rejected the PSCW and ICC petitioners' argument that this Court, in *College Savings*, invalidated all "so-called 'constructive' or 'implied' waivers." *Id.* at 30a. It explained that "[t]he Court in *College Savings* limited its abandonment of 'constructive' or 'implied' waivers to the 'ill conceived' 'constructive-waiver experiment of *Parden* [*v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184 (1964)],'" where the Court had held that a state waived its immunity by merely engaging in activity that is regulated by Congress. *Id.* The Seventh Circuit went on to illustrate the "fundamentally different" waivers that, under *College Savings*, "Congress may still obtain from the states." *Id.* at 30a-31a (discussing states' waiver of immunity by entering into an interstate compact that required Congress's approval pursuant to the Compact Clause in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and states' waiver of immunity once they have accepted federal funds allocated under Congress's Spending Power in *South Dakota v. Dole*, 483 U.S. 203 (1987)). These types of waiver illustrated that when petitioners accepted the gratuity of participating in a federal regulatory scheme, they necessarily caused a valid waiver of Eleventh Amendment immunity.

Second, the Seventh Circuit held that, "[a]s an independent basis for decision . . . the Eleventh Amendment does not bar the carriers from pursuing" *Ex parte Young* actions against the individual members of the state commissions in their official capacities. PSCW Pet.

App. 40a. The Court agreed with the two other circuits that have ruled on the issue that suits brought pursuant to § 252(e)(6) "are 'straightforward' *Ex parte Young* cases." *Id.* at 41a (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d 929, 934 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-598); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000)). It rejected petitioners' argument that a suit challenging a state commission's § 252(e) determination could not be brought under *Ex parte Young* because the relief sought would be retrospective in nature. The court explained that "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. at 42a.

The court also rejected petitioners' attempt to liken the present case to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). The court explained that, unlike the Indian Gaming Regulatory Act in *Seminole Tribe*, the 1996 Act does not create a "'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." *Id.* at 42a-43a. The court also explained that the "special sovereignty interests" that a state has in title over land and water within its borders and that were at stake in *Coeur d'Alene* "cannot be equated" with states' "interests in the regulation of telecommunication providers." *Id.* at 46a. Any independent interests that the states may have had in regulating interconnection agreements between carriers

and SGATs were validly extinguished by Congress with the 1996 Act. *Id.* at 46a-47a.

5. Relevant Events Following Appeal

Shortly after the Seventh Circuit issued its opinion and entered judgment against the two state commissions on July 24, 2000, the ICC defendants moved to stay the court's mandate pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending the filing of a petition for a writ of certiorari in the Supreme Court. The Seventh Circuit denied the motion. Thus, the mandate issued, and jurisdiction was returned to the district court.

On October 10, 2000, MCI and Ameritech moved the district court for the Northern District of Illinois to dismiss voluntarily all of their claims because the interconnection agreement at issue was going to expire. Their motion was granted. *See* ICC Pet. at 8. In a motion filed with the Seventh Circuit on October 23, 2000, the ICC defendants moved to have the court of appeals' opinion recalled and the judgment vacated because of the district court's dismissal order. *See id.* That motion was denied in a summary order on November 15, 2000.

REASONS FOR DENYING THE PETITIONS

Review should be denied in these cases. To begin with, the Illinois case is moot. Moreover, there are no conflicts among the circuits as to any of the questions presented, and petitioners identify no independent reason justifying this Court's review.

Although petitioners place the greatest emphasis on the waiver issue, the Seventh Circuit's ruling on the *Ex*

parte Young question is plainly correct, clearly not worthy of review, and sufficient on its own to justify the review of state commission actions that petitioners seek to block. Three circuits have now held that a lawsuit challenging approval of an interconnection agreement is properly brought against state public utility commissioners in federal court pursuant to *Ex parte Young* because (1) such a suit seeks prospective relief from an ongoing violation of federal law, and (2) nothing in the Act precludes reliance on *Ex parte Young*. There is no circuit split on this issue, and the arguments against application of *Ex parte Young* offered in the petitions suggest no reason to second-guess the prevailing consensus.

Because this case could properly be brought under *Ex parte Young*, it follows that a decision by the Court on the first Question Presented in both petitions – whether petitioners validly waived the Eleventh Amendment – will have no practical impact on any party. At the most, a ruling that petitioners did not waive the Eleventh Amendment would require amendment of the caption of these cases to limit the defendants to the commissioners in their official capacity. Given the Court's oft-expressed reluctance to review abstract issues of law that will have little or no practical importance in the case at hand, that fact alone would be a sufficient basis to deny review on the waiver issue. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In any event, even on its own terms, the waiver issue does not warrant review. The Seventh Circuit's finding of waiver conflicts with no decision in any other circuit. Nor is it inconsistent with *College Savings*. To the contrary, in *College Savings*, the Court recognized that it is well within Congress's power to condition receipt of a benefit

on a state's waiver of the Eleventh Amendment. That analysis applies here, where Congress largely preempted state regulation of an area of interstate commerce and then provided that a waiver of the Eleventh Amendment would result if state regulators deliberately and voluntarily accepted the benefit of participating in the new federal regulatory scheme.

Finally, the additional Questions Presented in the Wisconsin petition add little to the already weak argument for Supreme Court review in this case. The waiver argument fares no better when transformed into a Tenth Amendment "coercion" claim. In fact, this Court's Tenth Amendment cases strongly support Congress's power to regulate an area of interstate commerce and offer the states a chance to participate only on the terms set by Congress. The remaining question in the Wisconsin petition appears to be more or less a reiteration of unpersuasive points already made in the earlier discussion of waiver.

I. The Illinois Case Is Moot.

The case involving the ICC petitioners is moot because the case has been dismissed by the district court. The carriers – the aggrieved parties – voluntarily filed a joint motion requesting a dismissal of the case on mootness grounds. The district court granted the motion. *See* ICC Pet. at 8. In a subsequent brief before the Seventh Circuit, the ICC defendants agreed with the carriers and the district court that the case was moot. *See id.*

The Court has taught that a "case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal

quotation and citation omitted); *see also City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1390 (2000); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70-71 (1983); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Since there is no longer a live controversy with regard to the MCI-Ameritech agreement approved by the ICC, the ICC petitioners' current attempt to seek review of a strictly jurisdictional question from this Court should be summarily rejected. *See City of Erie*, 120 S. Ct. at 1390 ("The underlying concern [of the mootness doctrine] is that, when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated,' then it becomes impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).[3]

II. The Seventh Circuit's Reliance on *Ex parte Young* Does Not Warrant Review.

The PSCW petitioners' arguments for review by this Court are also severely undermined by their inability to make a plausible case for review of the *Ex parte Young* issue set forth in the fourth Question Presented. Three circuits have now held that a case like this one is a "straightforward *Ex parte Young* case." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000),

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[3] The Seventh Circuit has already addressed whether the mooting of the Illinois case requires that the ruling below be vacated. *See* supra p. 10. It summarily rejected the ICC petitioners' motion to vacate, presumably because the same opinion also applies to the Wisconsin cases.

cert. denied, 121 S. Ct. 54 (2000); *see* PSCW Pet. App. 41a (Seventh Circuit case below); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[4] There is no reason to question that consensus position.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials, seeking prospective relief from ongoing violations of federal law, is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting). These standards are plainly met here. Indeed, this Court has often recognized that *Ex parte Young*

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[4] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to § 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *US West Communications, Inc,v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

provides a proper vehicle for federal-court review of state commission decisions. *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (referring to the "many cases prior to and following *Ex parte Young* . . . in which this Court has granted . . . relief"); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908).

Thus, petitioners are left with the option of trying to make this case look like *Seminole Tribe*. In fact, however, there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it explicitly prohibited a court from enforcing its own order with contempt sanctions, as it normally would have the power to do. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available

under IGRA and an *Ex parte Young* action, where the typical remedy is an injunction and contempt sanctions are available.

Here, as the Seventh Circuit held, there is nothing in § 252 that would limit federal court review in a remotely comparable manner. *See* PSCW Pet. App. 42a-43a. In fact, allowing *Ex parte Young* suits to proceed pursuant to § 252(e) only realizes Congress's intention to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

Seminole Tribe also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term

"state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. § 153(41). Contrary to petitioners' claims, PSCW Pet. at 28-29; ICC Pet. at 20-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

The PSCW petitioners go on to argue that *Ex parte Young* does not apply where, as here, the state courts could provide an alternative forum. PSCW Pet. at 29-30. But the state courts are an alternative forum in nearly all cases where *Ex parte Young* authorizes a suit in federal court to vindicate federal law – including the paradigmatic case of a suit under 42 U.S.C. § 1983 seeking an injunction to enforce federal rights.[5/]

The ICC petitioners argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 23-27. But that argument is equally misplaced. It completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the

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[5] Moreover, the Act provides that, at least as to a commission decision approving or rejecting an interconnection agreement, review in federal court is the exclusive remedy. § 252(e)(4).

supremacy of federal statutory and constitutional law"); *Seminole Tribe*, 517 U.S. at 73-74 (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine.

Finally, it is baseless for the ICC petitioners to claim that the relief sought here is retrospective, and thus unavailable under *Ex parte Young*. ICC Pet. at 28-29. As the Seventh Circuit correctly held:

> The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine.

PSCW Pet. App. 42a (citation omitted).

Given the unanimity among the circuits on the application of *Ex parte Young* in actions under section 252, and the fact that the Court has twice denied review on this precise question during this Term,[6] there is no reason whatsoever to second-guess the Seventh Circuit's ruling on this issue. That, in turn, is by itself a sufficient reason to deny review on the separate question whether petitioners

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[6] *Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (cert. denied Oct. 2, 2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (cert. denied Oct. 30, 2000).

waived the Eleventh Amendment. Where a case can be decided on a ground that is relatively simple and non-controversial, this Court's practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, if they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").[7] *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 4.4, 172-73 (7th ed., 1993) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (cases cited omitted). The Court should follow the same practice here – denying review of issues that would remain purely "academic" unless and until the Court also overturned the Seventh Circuit's *Ex parte Young* ruling.

III. The Waiver Issue Does Not Warrant Review.

Even if the issue were squarely presented here in a non-abstract way, there would be no persuasive reason for the Court to review the Seventh Circuit's ruling that state commissions waive immunity when they undertake to review

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[7] In *The Monrosa*, the Court granted review to address the enforceability of a forum selection clause in a bill of lading. Having determined, however, that the case could be resolved on the alternative ground that the clause at issue did not cover actions *in rem*, the Court declined to address the enforceability issue. 359 U.S. at 184.

or apply interconnection agreements under the Act. Here again, although petitioners claim that the federal courts are in disarray on this question, the Tenth Circuit – the only other court of appeals to have addressed the question – is in agreement with the Seventh Circuit. *MCI Telecommunications Corp.*, 216 F.3d at 936-39.[8] Moreover, both circuits have faithfully followed this Court's teachings in *College Savings*.[9]

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[8] Petitioners cite three rulings of courts of appeals in support of their claim of disarray on this issue. PSCW Pet. at 17-18; ICC Pet. at 18-19. In the first, *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), the only reference to the Eleventh Amendment is pure dicta in a footnote. *See id.* at 922 n.6. The state commission, as a corporate entity, was not even a defendant in *Strand* and the Sixth Circuit determined that the waiver issue was not presented because *Ex parte Young* applied.

The second case cited by petitioners, *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999), *petition for cert. filed*, 69 U.S.L.W. 3296 (U.S. Oct. 16, 2000) (No. 00-610), did not concern the 1996 Act. Moreover, plaintiff-appellants in *Burnette* relied on *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), an opinion that was overruled by *College Savings* shortly after plaintiff-appellants there presented oral argument. 192 F.3d at 60. Finally, petitioners cite *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). That case also did not involve the 1996 Act and dealt with the question of the states' authority to *abrogate* Eleventh Amendment immunity under the Fourteenth Amendment.

[9] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. See, e.g., *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or.

In *College Savings*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. at 666, 679. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court created an irrebuttable presumption that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally

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1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

Here, the Seventh Circuit followed *College Savings* in holding that the PSCW and ICC defendants voluntarily waived their sovereign immunity when they decided to arbitrate or approve the disputes at the core of this case. PSCW Pet. App. 28a-32a. Pursuant to the teachings in *College Savings*, the court "[could] not accept the commissions' argument that all constructive waivers are now foreclosed." *Id.* at 30a-31a (discussing *Petty* and *Dole*). Instead, the Seventh Circuit understood "the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states" by doing away with the *Parden*-styled "forced waiver" in which a "state is threatened with the sanction of waiving its immunity if it

engages in a regulated enterprise." *Id.* at 31a (citing *College Savings*, 527 U.S. at 683, 690).

This case, by contrast, involves a new federal regulatory program in which states may voluntarily choose to participate. Because Congress has set terms for that participation, regulation of carrier-to-carrier agreements concerning local interconnection "is no longer an 'otherwise permissible activity' for states." PSCW Pet. App. 40a. The states "are free to accept or reject the terms Congress has offered," *id.*, but if they accept the "regulatory power offered by Congress, [they] must accept the condition that was attached" – "submi[ssion] to federal jurisdiction to review their actions." *Id.* at 38a.[10]

Petitioners' primary argument for the claim that they should be allowed to accept the benefit of participation in the section 252 process while evading the federal judicial review that goes with it relates to the scope of preemption of state law by the Act. Petitioners assert that Congress did not and could not preempt "*all* state jurisdiction over local telecommunications competition as a necessary predicate to the gratuity," because the Act does not contain an express statement making "such a broad preemption." PSCW Pet. at 15; *see also* ICC Pet. at 17-18. They go on to assert that the Seventh and Tenth Circuits' holdings are "flawed" because they "rest[] on the bare assertion that, '[a]lthough it did not do so, Congress *could have* preempted all regulation of local

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[10] The FCC has made clear that it stands ready to step in if a state commission chooses not to participate in the regulatory scheme, including at the stage of enforcing interconnection agreements. *See In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (June 14, 2000).

phone service'." PSCW Pet. at 15 (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d at 938).[11] They conclude that the real issue here is "whether a state's existing, un-preempted *police power presence* in local telecommunications competition could lead to the waiver of Eleventh Amendment immunity." *Id.* at 17 (emphasis added).

This argument is utterly unpersuasive. It is true that the Act does not completely foreclose the operation of state law in the area of telecommunications addressed by sections 251 and 252. State laws may continue to be applied to the extent they supplement and are consistent with the Act. §§ 252(e)(3), 253. But it is not the application of state law – *i.e.*, the exercise of police power – that triggers the waiver. The waiver occurs if a state chooses to apply *federal* standards in a *federally* prescribed arbitration process,

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[11] The ICC petitioners make the additional argument that "[t]he Act does not inform states with the clarity required by this Court that performing the regulatory responsibilities given to them will result in waiver of their sovereign immunity." ICC Pet. at 19. Again, they rely on a completely unrelated case to support this argument. *Id.* (citing *United States v. Nordic Village*, 503 U.S. 30 (1992)). Moreover, the Seventh Circuit carefully examined this contention and concluded that Congress had "expressed unmistakably" its insistence on federal court review of the actions of states choosing to participate under the Act. PSCW Pet. App. 34a.

The ICC petitioners also argue that Congress may not offer the states an invitation to waive immunity in return for a "gratuity" in a statute premised on the Commerce Clause. ICC Pet. at 11-14. Here again, the Seventh Circuit addressed this argument persuasively. PSCW Pet. App. 35a-36a.

replacing the FCC in that role.[12]

Certainly there can be no doubt that Congress has imposed detailed federal standards and procedure governing the area of local interconnection. As the Court noted in *AT&T Corp.*:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

525 U.S. at 378 n.6. For that reason, the Court added, "there is no doubt . . . that if federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*[13]

Given that reality, it would make no sense to hold that petitioners' conditional waiver of the Eleventh Amendment was invalid because Congress did not preempt state law in a

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[12] The PSCW petitioners also include a third Question Presented and a corresponding section of the Petition, PSCW Pet. at 23-27, arguing that the Act does not evince a congressional intent to preempt all state jurisdiction over local interconnection. This argument adds little or nothing to petitioners' flawed discussion of waiver.

[13] The local competition provisions of the Act concern only one narrow (albeit important) slice of regulation: the terms and conditions of interconnection *between competing phone companies*. *See Puerto Rico Tel. Co. v. Telecommunication Regulatory Board of Puerto Rico*, 189 F.3d 1, 8, 12-13 (1st Cir. 1999). States, therefore, retain the regulatory powers over local telephone service that they may choose to exercise outside the sphere of interconnection agreements, including any power under state law to regulate the terms and conditions under which telephone companies offer local service to subscribers. *See* § 253(b); *Puerto Rico Tel.*, 189 F.3d at 12.

fully comprehensive fashion. Congress created a new federal program that "federalized" much of a given area of telecommunications regulation. A state's participation in that program can validly be conditioned on acceptance of federal judicial review, even if some aspects of applicable state law remain operative.

IV. The Wisconsin Petitioners' Tenth Amendment Argument Does Not Warrant Review.

The PSCW petitioners go on to claim that the Act violates the Tenth Amendment because it "coerces," and does "not merely encourage," states to waive their constitutionally protected sovereign immunity. PSCW Pet. at 19; *see also* ICC Pet. at 13-14 (Congress has "demand[ed], as a condition for state participation in the federal scheme, a waiver of the state's immunity"). This coercion is said to arise because a state's decision not to participate in the arbitration and approval of § 252 interconnection agreement would, as a practical matter, leave the state with no ability to apply its state law and policies to the same matter. PSCW Pet. at 20-22. Petitioners rely on *FERC v. Mississippi*, 456 U.S. 742 (1982), as authority for the proposition that this level of "coercion" violates the Tenth Amendment. PSCW Pet. at 20.

In fact, however, *FERC v. Mississippi* and the related Tenth Amendment rulings of this Court strongly support what Congress did in the Act. They stand for the proposition that Congress may impose federal regulation on an area of interstate commerce previously regulated by the states, and then pursue "cooperative federalism" by giving the states the choice of regulating consistent with federal requirements or not at all.

Thus, the Court in *FERC v. Mississippi* held that the law at issue did not compel "the States to enact a legislative program," but "simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals." *FERC*, 456 U.S. at 765. The law was held to be a proper exercise of Congress' power to "pre-empt the States entirely in the regulation of private utilities." *Id.* at 764.

Here, as in *FERC*, the Act does not "commandeer" states to administer federal law. "To the contrary, [the Act] offers the States a vehicle for remaining active in an area of overriding concern," although in a more limited capacity. *Id.* at 766. Petitioners, in turn, *voluntarily* accepted Congress's invitation to participate when they chose to entertain the disputes, arbitrate negotiations, directed the parties to prepare agreements and statements, and approved the submitted agreements and statements in accordance with the Act. PSCW Pet. at 3-4. They certainly were not coerced with the threat of sanction or being barred from engaging in an "otherwise lawful activity." Petitioners' participation in the administration of the Act was a "gratuity" that Congress was free to grant (or withhold) at its pleasure.

The Tenth Circuit, the only other court of appeals to have entered judgment on this question, is in lock-step with the Seventh Circuit on this question. *See MCI Telecommunications Corp.*, 216 F.3d at 938 ("[The Act] invites states to participate in the federal government's regulation of local telephone service. Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity. . . . Thus, § 252 puts [the states] on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252.").

In sum, petitioners have not identified a conflict in the circuits on any of the questions presented, and have given no other reason justifying this Court's review.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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Nos. 00-653 and 00-744

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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3211

QUESTIONS PRESENTED

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbent carriers' network elements. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state public utility commission's voluntary acceptance of Congress's offer to exercise regulatory authority pursuant to the scheme set forth in the 1996 Act constitutes a waiver of immunity from suit in federal court, where the Act clearly provides for review in federal court of a state commission's actions.

2. Whether, in the alternative, the commissioners of a state public utility commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking prospective injunctive relief from orders by the state commission alleged to violate federal law.

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In the Supreme Court of the United States

No. 00-653

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.

No. 00-744

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (PSCW Pet. App. 1a-48a; ICC Pet. App. 1a-54a) is reported at 222 F.3d 323.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2000. The petition for a writ of certiorari in No. 00-653 was filed on October 23, 2000 (a Monday). On October 18, 2000 , Justice Stevens extended the time within which to file a petition for a writ of certiorari in No. 00-744 to and including November 5, 2000, and the petition was filed on November 6, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to

provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telecommunications markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the incumbent's existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the 1996 Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with those of incumbents, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and

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[1] All citations of the 1996 Act are of Supp. IV 1998.

conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physieal access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c). The Act provides for binding arbitration in the event that the parties cannot conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(e)(5).

b. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission (FCC) will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. A negotiated agreement is subject to review by the state commission (or, if the state com-

mission chooses not to engage in such review, by the FCC) to determine whether the agreement discriminates against non-party carriers and is consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiation and proceed to arbitration, the state public utility commission (or the FCC) will resolve any open issue, including the rates, terms, and conditions under which the new competitor will enter the local market, as well as prices that both the incumbent and the new entrant will pay one another for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). An arbitrated agreement is subject to review by the state commission to determine whether the agreement meets the requirements set forth in the Act. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission approving or rejecting an interconnection agreement may file suit in federal district court for a determination of "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the state commission has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. The Illinois Commerce Commission (ICC) and the Public Service Commission of Wisconsin (PSCW) have

voluntarily exercised regulatory authority under the 1996 Act. Both state commissions have arbitrated unresolved issues in interconnection agreements between incumbent carriers and new entrants, approved final interconnection agreements, and interpreted and enforced the provisions of existing interconnection agreements.

Carriers "aggrieved" by actions of the ICC or the PSCW, in exercising their authority under the 1996 Act with respect to interconnection agreements, filed suits in federal district court pursuant to Section 252(e)(6). The suits contended that the state commissions acted contrary to the Act in approving, interpreting, and enforcing interconnection agreements (or, in one instance, in rejecting a statement of generally applicable terms or conditions, see 47 U.S.C. 252(f)). Each suit named as defendants both the relevant commission and its individual commissioners.

In each case, the state commission and its commissioners moved to dismiss on Eleventh Amendment immunity grounds. The United States and the FCC intervened to defend the constitutionality of the 1996 Act.

a. In the Illinois cases, the district court denied the motion to dismiss of the ICC and its commissioners on two independent grounds. ICC Pet. App. 74a-104a.

The district court first held that the State had waived its sovereign immunity from suits in federal court challenging the ICC's exercise of authority under the 1996 Act. ICC Pet. App. 88a-92a. The court explained that Congress gave States a choice whether to participate in the federal regulatory scheme created by the Act. *Id.* at 90a. The court further explained that Congress placed the States on clear notice that, if they chose to participate in that federal regulatory scheme,

they would be subject to suit in federal court to assure that their actions conformed to federal law. *Id.* at 89a-90a. The court concluded that the State, through the ICC, had made that voluntary election. *Id.* at 90a, 92a.

Alternatively, the district court held that the individual commissioners of the ICC are subject to suit under the exception to the doctrine of sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officials to enjoin ongoing violations of federal law. ICC Pet. App. 92a-102a. The court rejected the argument that "the *Ex parte Young* doctrine does not apply * * * because the type of relief sought by the plaintiffs is retrospective"; the court concluded that the relief sought against the commissioners, "an injunction or declaration requiring [them] to follow the [1996] Act in making their regulatory decisions," is "undeniably prospective." *Id.* at 93a-95a. The court also rejected the argument that *Ex parte Young* applies only to violations of the Constitution, not to violations of federal statutes, explaining that *Ex parte Young*'s purpose of "promot-[ing] the vindication of federal rights" is served in both instances. *Id.* at 95a. The court further held that neither *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), nor *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), precludes the application of the *Ex parte Young* exception in the circumstances of this case. ICC Pet. App. 94a-102a.

The Seventh Circuit affirmed on the ground that a state commission waives immunity from suit by electing to exercise regulatory authority under the 1996 Act. ICC Pet. App. 55a-73a. Shortly after the Seventh Circuit issued that decision, however, this Court issued decisions in three cases involving Eleventh Amendment

issues.[2] In light of those decisions, the Seventh Circuit granted rehearing. *Id.* at 5a-6a.

b. In the Wisconsin cases, the district court granted the motion to dismiss on immunity grounds of the PSCW and its commissioners. PSCW Pet. App. 49a-76a (first decision); *id.* at 77a-94a (second decision).

In its first decision, the district court concluded that the Eleventh Amendment barred suit against the PSCW and its commissioners. PSCW Pet. App. 49a-76a. The court rejected the argument that the PSCW had waived its immunity to suit by choosing to exercise federal regulatory authority. While agreeing that the 1996 Act provides clear notice to state commissions that acceptance of new regulatory authority offered by the 1996 Act would subject them to suit in federal court, *id.* at 60a-61a, the court held that state participation in the new scheme was not "voluntary" because "staying out of the interconnection process cannot be said to be a realistic option for a state commission," *id.* at 67a.

The district court also rejected the argument that review of the PSCW's determinations was permitted under the *Ex parte Young* exception. While acknowledging that suits against state officials seeking prospective injunctive relief are typically available under *Ex parte Young*, the court held that such review was barred in this context based on its understanding of *Seminole Tribe*. PSCW Pet. App. 68a-73a. Before dismissing the case, however, the court requested further briefing on whether the PSCW was an indispensable

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[2] See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999); *Alden* v. *Maine*, 527 U.S. 706 (1999).

party to suit under Rule 19(b) of the Federal Rules of Civil Procedure. *Id.* at 75a.

While the Wisconsin cases remained pending in district court, the Seventh Circuit issued its initial decision in the Illinois case and then granted rehearing in that case. See pp. 7-8, *supra.*

In the meantime, the district court in the Wisconsin cases held that, in light of *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Seventh Circuit's decision in the Illinois case was no longer good law. PSCW Pet. App. 86a. The court stated that, although *College Savings Bank* preserved some implied waivers of sovereign immunity, the circumstances in which such waivers would be recognized were limited. *Id.* at 87a. The court also reiterated its conclusion that review under *Ex parte Young* was unavailable. *Id.* at 82a-84a. Having concluded that suit against the PSCW and its commissioners was barred by the Eleventh Amendment, the court held that the PSCW was an indispensable party within the meaning of Rule 19. *Id.* at 89a-93a. Accordingly, the court dismissed the case in its entirety.

3. In a decision addressing the appeals in the Wisconsin cases and the rehearing petitions in the Illinois cases, the Seventh Circuit held that the Eleventh Amendment does not preclude suits against a state public service commission or its members challenging its exercise of authority under the 1996 Act. PSCW Pet. App. 1a-48a. The court held that, "by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Eleventh Amendment immunity from suit in federal court." *Id.* at 47a-48a. In the alternative, the court held that review of decisions

by state commissions was also available in an action against the individual commissioners under *Ex parte Young*, "[b]ecause the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief." *Id.* at 48a. Having found that the Eleventh Amendment posed no bar to suit against state commissions or commissioners, the Seventh Circuit had no occasion to address the question of whether the commissions or commissioners are indispensable parties to suit.

Before reaching the Eleventh Amendment issues, the Seventh Circuit held, as a threshold matter, that federal courts have jurisdiction under Section 252(e)(6) to review determinations by state public utility commissions. PSCW Pet. App. 25a-27a. Rejecting petitioners' arguments that the 1996 Act does not provide for suit against state commissions "but instead provides only for federal court review of the interconnection agreements themselves," the court explained that the text and structure of the Act made clear "that Congress contemplated suits against state defendants in federal court." *Id.* at 25a. Citing *Southwestern Bell Telephone Co.* v. *Public Utilities Commission*, 208 F.3d 475 (5th Cir. 2000), the court also held that Section 252(e)(6) confers jurisdiction on federal courts to review enforcement decisions by state commissions interpreting previously approved interconnection agreements, as well as decisions approving or rejecting such agreements in the first instance. PSCW Pet. App. 26a.

a. Turning to the Eleventh Amendment issues, the court of appeals held that the state public utility commissions waived their immunity in federal court from suits contending that their approval, rejection, interpretation, or enforcement of interconnection agreements violates federal law. The court reasoned that the

state commissions voluntarily accepted Congress's offer of federal regulatory authority under the 1996 Act—an offer that was clearly conditioned on the state commissions' agreement that they would be subject to suit in federal court arising from their exercise of that authority. PSCW Pet. App. 28a-40a.

First, the court of appeals considered whether Congress *could*, consistent with this Court's decisions, condition a grant of regulatory authority on a State's waiver of its Eleventh Amendment immunity. While recognizing that *College Savings Bank* overruled the "forced waiver" doctrine—under which a State was deemed to have waived its immunity merely by participating in activities governed by various federal statutes—the court noted that *College Savings Bank* "did not call into question other types of 'constructive' waivers obtained by Congress acting within its Article I powers." PSCW Pet. App. 30a. To the contrary, the court concluded that *College Savings Bank*, in citing two examples of waivers that Congress may still obtain from the States,[3] preserved Congress's authority to condition a "gratuity" to the States upon a waiver of immunity. *Id.* at 30a-31a.

Second, the court of appeals considered whether Congress *did*, with the requisite degree of clarity, condition the States' participation in the regulatory scheme established by the 1996 Act on a waiver of immunity. Rejecting petitioners' argument that Congress had to

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[3] The examples given in *College Savings Bank* concerned approval of an interstate compact conditioned upon a waiver of immunity, see *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and a grant of federal highway funds conditioned upon a higher state drinking age, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

mention the Eleventh Amendment explicitly in order to create a valid condition, the court explained that the structure of Section 252 "makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place." PSCW Pet. App. 33a. Thus, the court concluded, "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 34a.

Third, the court of appeals considered whether the States have, in fact, waived their Eleventh Amendment immunity under the 1996 Act. PSCW Pet. App. 34a. Citing the Tenth Circuit's recent decision in *MCI Telecommunications Corp.* v. *Public Service Commission*, 216 F.3d 929 (2000), petition for cert. pending, No. 00-593, the court held that "states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act." PSCW Pet. App. 35a.

In support of that conclusion, the court of appeals rejected petitioners' argument that the waiver obtained by the 1996 Act is "fundamentally different" from the waivers in the earlier cases discussed with approval in *College Savings Bank*. In response to petitioners' argument that those waivers were contained in enactments under Congress's Compact Power and Spending Power, while the 1996 Act rests upon Congress's Commerce Power, the court observed that the analysis

in *College Savings Bank* "did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers." PSCW Pet. App. 35a. The court explained that "the key in those cases was that Congress had the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take." *Id.* at 36a.[4]

The court of appeals determined that the state commissions' authority to regulate matters encompassed by the 1996 Act is a gratuity, because that authority is "derived from provisions of the Act and not from [the commissions'] own sovereign authority." PSCW Pet. App. 37a. The court observed that Congress "*could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government" and, in the 1996 Act, "Congress *did* take over some aspects" of local telecommunications regulation and "precluded all other regulation [of those aspects] except on its terms." *Id.* at 36a-37a. The court therefore concluded that, when state commissions engage in the regulation of local telecommunications in areas encompassed by the Act, they are not engaged in

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[4] In rejecting the argument that waivers under the 1996 Act "cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power," the court of appeals explained that "[t]he state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms." PSCW Pet. App. 38a. Thus, the court noted, "[t]he only difference between the classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator." *Ibid.*

"otherwise permissible activity" as that term is used in *College Savings Bank*; the court explained that, "the states are not merely acting in an area regulated by Congress," but "are now voluntarily *regulating on behalf of Congress*." *Id.* at 37a, 40a. In such circumstances, the court concluded, Congress may offer such regulatory power to the States, attaching conditions to that offer if it sees fit, and "States are free to accept or reject the terms Congress has offered." *Id.* at 40a.[5]

b. As an "independent basis for decision," the court of appeals held that the Eleventh Amendment does not bar prospective injunctive relief against the individual members of the state commissions. PSCW Pet. App. 40a. The court agreed with decisions in the Sixth and Tenth Circuits holding that suits against state commissioners under the 1996 Act present a "straightforward" application of the *Ex parte Young* exception. *Id.* at 41a. The court concluded that, because the parties "seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law," the relief sought "is precisely the type contemplated by the *Ex parte Young* doctrine." *Id.* at 42a.

The court of appeals rejected petitioners' argument that *Seminole Tribe* "renders the *Ex parte Young* doctrine inapplicable" to suits against state commissioners under the 1996 Act. PSCW Pet. App. 42a. The court explained that "Congress has not limited the court's

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[5] The court of appeals noted that the one case before it involving a privately negotiated agreement had been dismissed, thereby obviating the need to decide "whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be 'deemed approved' under 47 U.S.C. § 252(e)(4)." PSCW Pet. App. 39a n.11.

remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act," as Congress did under the Indian Gaming Regulatory Act at issue in *Seminole Tribe*. *Id.* at 45a.

The court of appeals also concluded that allowing suit under *Ex parte Young* would not implicate "special sovereignty interests" in the manner identified as problematic in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). PSCW Pet. App. 45a-47a. Unlike the State's interest in real property in *Coeur d'Alene*, the court explained, "[i]n the wake of the 1996 Telecommunications Act," the States' interest in regulating matters encompassed by the Act "is derived solely from the regulatory role Congress has bestowed upon the states." *Id.* at 46a-47a

ARGUMENT

The Seventh Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, to the extent that other courts of appeals have considered the question presented in this case, they have reached the same answer as did the Seventh Circuit. See *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000) (finding no Eleventh Amendment bar on both waiver and *Ex parte Young* grounds), petition for cert. pending, No. 00-593; *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.) (basing decision solely on *Ex parte Young*), cert. denied, 121 S. Ct. 54 (2000). This Court's review is therefore not warranted.

1. The court of appeals correctly held that state public utility commissions waived their immunity from suit in federal court by voluntarily accepting Congress's offer to exercise regulatory authority under the new scheme established by the 1996 Act to promote com-

petition in local telecommunications markets. The Act provides that a regulatory body will exercise authority, subject to review in federal court, over agreements between incumbent carriers and new entrants pursuant to the Act (*i.e.*, agreements concerning interconnection, access to network elements, resale of services, etc.). See 47 U.S.C. 251, 252. If that responsibility is undertaken by the FCC, pursuant to 47 U.S.C. 252(e)(5), the FCC's actions are reviewable in the federal courts of appeals, as provided in the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998). If, in the alternative, a state commission accepts Congress's offer of regulatory authority under the Act, the state commission does so with full knowledge that the Act permits aggrieved parties to seek "[r]eview of State commission actions" in federal district court. 47 U.S.C. 252(e)(6). Thus, the Act clearly puts the state commissions on notice that, if they elect to participate in the federal regulatory scheme, they will do so subject to review of their actions in federal court.[6]

The Seventh Circuit's decision that States waive their Eleventh Amendment immunity by assuming a regulatory role under the 1996 Act is fully consistent with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). *College Savings Bank* does not suggest that Congress cannot condition a State's exercise of regulatory authority under a federal statute—authority that would otherwise be exercised by a federal agency, subject to review in federal court—on the State's amenability to federal court

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[6] Petitioners do not contend that the 1996 Act lacks sufficient clarity to put state public utility commissions on notice that their actions will be reviewed in federal court.

review of its exercise of that regulatory authority. To the contrary, *College Savings Bank* confirms that Congress's ability to impose conditions on a State's voluntary exercise of federal authority is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). See 527 U.S. at 675-687.[7]

College Savings Bank makes clear, as the Seventh Circuit and other courts of appeals have recognized,[8]

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[7] The *Parden* doctrine applied when a State took part, as would a private party, in federally regulated activity and thereby became subject to controlling federal law. Thus, under the *Parden* doctrine, States that engaged in enterprises governed by federal statutes—such as the Lanham Act or the Patent Act—might be thought to have consented voluntarily to suit under those statutes. As Justice Scalia suggested as early as his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 41-45 (1989) (Scalia, J., dissenting in part), *Parden* waivers accomplished the same result as a federal abrogation of state immunity for actions in a regulated area. Accordingly, once the Court overruled *Union Gas*, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and declared Congress without authority to abrogate state immunity under its Article I powers, the *Parden* doctrine lost vitality. As the Court explained in *College Savings Bank*, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." 527 U.S. at 683. Accordingly, because Congress could not abrogate a State's immunity for violations of the Lanham Act, neither would a State be held to have impliedly waived its immunity by engaging in conduct subject to that Act.

[8] See *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999) (finding waiver of immunity based on acceptance of federal funds), cert. granted on other grounds *sub nom. Alexander* v. *Sandoval*, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 556 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1220 (2000); *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281 (10th Cir. 1999) (same), cert. denied, 120 S. Ct. 1530 (2000).

that a State may impliedly waive its immunity in certain contexts. In particular, the Court reaffirmed its holding in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that "a bistate commission which had been created pursuant to an interstate compact * * * had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Sav. Bank*, 527 U.S. at 686. The Court explained that, in *Petty*, Congress was simply imposing a condition on a grant of authority that the State would not otherwise possess, because interstate compacts cannot be formed without congressional approval. *Ibid.* Thus, the Court observed, Congress's action in *Petty* was a "gratuity" in the same sense as a disbursement of federal funds, a context in which it is well established that Congress may condition state participation on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

As in *Petty* and *Dole*, this case involves a condition imposed on a "gratuity"—which a State may freely choose to accept or reject—analogous to the conditional grant of congressional approval of the interstate compact in *Petty*. As the Court noted in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6. Congress allowed the States, through their public utility commissions, to play a role in that regulation, but only if they agreed to be subject to federal judicial review to ensure compliance with the new federal standards. Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the Act does not allow the States simply "to do

their own thing," and, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Ibid.*[9]

Petitioners contend that state commissions cannot be deemed to have waived their Eleventh Amendment immunity, because the authority to regulate interconnection agreements cannot properly be viewed as a "gratuity" within the meaning of *College Savings Bank*. Unlike the "fundamentally consensual" waivers in *Petty* and *Dole*, petitioners argue (PSCW Pet. 17), the issue here is "whether a state's existing, un-preempted police power presence in local telecommunications competition could lead to the wavier of Eleventh Amendment immunity." Petitioners' characterization of the state commissions' regulatory role reflects a fundamental misunderstanding of changes wrought by the 1996 Act. As the court of appeals recognized (PSCW Pet. App. 36a), Congress could—and did—take over certain aspects of local telecommunications regulation from the States. Far from preserving the status quo, the Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in areas encompassed by the Act only to the extent consistent with the Act and

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[9] The question whether the Eleventh Amendment protects States from suit under the 1996 Act was not at issue in *Iowa Utilities Board*. Nor is that question presented in the five pending petitions for a writ of certiorari arising from the Eighth Circuit's decision on remand in *Iowa Utilities Board*. Those petitions instead involve the rules promulgated by the FCC to implement the substantive requirements of Section 251(c). See *Verizon Communications, Inc.* v. *FCC* (No. 00-511); *WorldCom, Inc.* v. *Verizon Communications, Inc.* (No. 00-555); *FCC* v. *Iowa Utils. Bd.* (No. 00-587); *AT&T* v. *Iowa Utils. Bd.* (No. 00-590); *General Communications, Inc.* v. *Iowa Utils. Bd.* (No. 00-602).

implementing FCC regulations. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to provisions of federal law. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).[10]

Based upon their flawed conception of state commissions' regulatory authority after the 1996 Act, petitioners also assert that this case implicates a circuit split. But the principal cases that petitioners rely upon to support that assertion (see PSCW Pet. 18) stand only for the unexceptional proposition that a State's "mere presence" in a federally regulated area cannot be construed as a waiver of immunity. See *Burnette* v. *Carothers*, 192 F.3d 52, 60 (2d Cir. 1999) (State did not impliedly waive its sovereign immunity by engaging in activity subject to federal environmental statutes), cert. denied, No. 00-610 (Dec. 11, 2000); *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (State

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[10] To be sure, while Congress has "taken the regulation of local telecommunications competition away from the States" with respect to "matters addressed by the 1996 Act," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, Congress has not taken over the regulation of all aspects of local telecommunications. And Congress preserved the ability of the States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 261(b) and (c). Contrary to petitioners' assertions (see, *e.g.*, PSCW Pet. 15, ICC Pet. 16-18), however, the fact that Congress did not supplant state regulation in every possible respect does not undermine the court of appeals' waiver analysis; the court held that the States waived their sovereign immunity from suit in federal court only with respect to those matters as to which Congress *has* supplanted state regulation.

did not impliedly waive its sovereign immunity by engaging in activity subject to federal copyright and trademark statutes). Those cases do not involve the 1996 Act or the regulation of local telecommunication markets. Nor do those cases address the question whether a State waives its immunity when it exercises substantial *new* regulatory authority conferred by Congress with conditions clearly attached.[11]

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for incumbents and new entrants to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions in such agreements. Thus, the regulation of interconnection agreements, as creatures of federal law, is not an "otherwise permissible activity" under *College Savings Bank*. Instead, such regulation is akin

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[11] Petitioners' reliance on *GTE North, Inc.* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), is equally unavailing. Although the Sixth Circuit stated in a footnote in *GTE North* that the 1996 Act "cannot legitimately be construed as a valid waiver of sovereign immunity," *Id.* at 922 n.6, the court's mention of waiver was dicta. The Sixth Circuit recognized that the case could proceed against the state commissioners on *Ex parte Young* grounds. *Id.* at 922 & n.6. No waiver theory was briefed or argued in that case because the district court's jurisdiction over the preemption claim there was based solely on 28 U.S.C. 1331, not on Section 252(e)(6).

to a "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act while simultaneously rejecting the federal judicial review that is a critical part of the regulatory scheme.[12]

2. The Seventh Circuit's explicitly "independent basis for decision" (PSCW Pet. App. 40a)—that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit for prospective relief against the commissioners of the PSCW and the ICC—is also correct and in accord with the decisions of the only courts of appeals that have addressed the issue. See *MCI Telecomms.*, 216 F.3d at 939; *Michigan Bell*, 202 F.3d at 867. Indeed, this Court has denied petitions for certiorari in two cases raising the precise arguments against *Ex parte Young* review that petitioners present here. See *Strand* v. *Michigan Bell Tel.*, 121 S. Ct. 54 (2000) (No. 99-1878); *Strand* v. *Verizon North Inc.*, 121 S. Ct. 380 (2000) (No. 00-101). No different result is warranted in this case.

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[12] Petitioners' argument (PSCW Pet. 19-23) that state commissions have no meaningful "choice" under the Act, but instead are "coerced" to regulate in violation of the Tenth Amendment, is not suitable for this Court's review. None of the courts below addressed that question. Cf. *Michigan Bell*, 202 F.3d at 866 (holding that the 1996 Act does not "compel" actions by state commissions in violation of the Tenth Amendment). In any event, as the foregoing discussion illustrates, state commissions do have a meaningful "opt-out" option under the Act. Indeed, at least one state commission has declined to exercise regulatory authority in this context. See *In re Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52 (FCC June 14, 2000).

This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude an action that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 102 (1984); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105 (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).[13]

The court of appeals correctly held that the suits consolidated here "fit squarely within the traditional framework of *Ex parte Young*." PSCW Pet. App. 42a. In naming the commissioners of the PSCW and the ICC as parties in suits seeking review of those commissions' determinations under Section 252(e)(6), the parties are seeking "to have the commissioners conform their future actions, including their continuing enforcement

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[13] Contrary to petitioners' assertions (ICC Pet. 23-27), the *Ex parte Young* exception is not limited to suits alleging *constitutional* violations. The exception applies equally where the state official's conduct is alleged to violate a federal statute. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 & n.6 (1978); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (presupposing same). Indeed, if petitioners' assertion were correct, *Seminole Tribe* and *Coeur d'Alene Tribe*, neither of which alleged any federal constitutional violation, could have been disposed of on much simpler grounds.

of the challenged determinations, with federal law." *Ibid.* That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (opinion of Kennedy, J.) (observing that *Ex parte Young* and its progeny teach "that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[14]

Petitioners argue principally (PSCW Pet. 27-29) that the *Ex parte Young* exception is improper in this case under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).[15] But *Seminole Tribe* involved what the Court described as a "carefully crafted and intricate remedial scheme" that made only a "modest set of sanctions" available to aggrieved parties in federal court. *Id.* at 73-75. Here, in contrast, Congress did not similarly restrict the remedies available in federal court to parties aggrieved by actions of state commissions under the 1996 Act.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No.

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[14] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether *Ex parte Young* relief is available against state officials is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

[15] Petitioners also assert (PSCW Pet. 27, ICC Pet. 28-29) that the *Ex parte Young* exception is unavailable in this case, because the plaintiff carriers are not seeking prospective relief against the commissioners. The court of appeals correctly rejected the premise of petitioners' argument. As the court noted, "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. 42a.

100-497, 102 Stat. 2467, that established a framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith was an order directing the State to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then prescribe regulations. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal courts to provide, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that the Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.[16]

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[16] As noted in the text, the Court's focus in *Seminole Tribe* was on the "carefully crafted and intricate" statutory scheme governing the remedies available once the dispute reached federal court. The Court concluded that, because Congress had specified only a "modest set of sanctions" to be imposed by the court, Congress did not intend that additional remedies be available under *Ex parte Young*. See 517 U.S. at 74-76. That reasoning does not apply where, as under the 1996 Act, Congress has not restricted the remedies available in federal court. It is thus irrelevant whether the regulatory process, which precedes the judicial process provided for under the Act, might itself be characterized as "carefully crafted and intricate."

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the 1996 Act. In contrast to the statute in *Seminole Tribe*, the 1996 Act does not narrowly circumscribe the remedies available in federal court to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or rejected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is thus fully consistent with the remedy contemplated by Congress. It does not expand the remedies or scope of judicial review available under the Act.

Finally, petitioners contend (PSCW Pet. 30) that the *Ex parte Young* exception is inapplicable because "state court review remains available to compel correction of an erroneous state commission action." To the extent review is sought for decisions by state commissions "approving or rejecting an agreement," however, state courts are expressly divested of jurisdiction under the Act. 47 U.S.C. 252(e)(4). Moreover, even in those circumstances where state court review is not expressly precluded—as where a state commission interprets or enforces provisions in an existing interconnection agreement—the availability of such review does not affect the applicability of *Ex parte Young*. Indeed, the premise of *Ex parte Young* is that, regardless of possible remedies in state court, "[r]emedies designed to end a continuing violation of federal law are

necessary to vindicate the federal interest in assuring the supremacy of the law." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). Thus, the court of appeals correctly held here that *Ex parte Young* provides an independent basis for suit against individual state public utility commissioners to obtain review of their actions under the 1996 Act.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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(4)

No. 00-744

In the Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, ET AL.,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this court should grant certiorari to review a decision of a court of appeals where, after that decision was rendered, the district court entered an order dismissing all of the claims in the lawsuit with prejudice and that dismissal order was not appealed.

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company. d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). Under that new regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal substantive standards created by the Act. *Id.* at 377-78 & n.5; see also 47 U.S.C. § 201(b). As Justice Scalia's opinion for the Court explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.*, 525 U.S. at 378 n.6. At the same time, Congress established a new, voluntary role for state regulators to help administer the Act. If the state regulators choose to discharge their delegated responsibilities under the Act, their actions are reviewable in federal court. 47 U.S.C. § 252(e)(6) & (4). If the state regulators decline the regulatory role offered to them by Congress, the FCC must assume that role. 47 U.S.C. § 252(e)(5).

B. Section 252 Interconnection Agreements. The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Most significantly, sections 251

and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2).

C. Judicial Review and FCC Preemption of State Commission Inaction. Although the Act does not require state regulators to participate in the new federal scheme for the regulation of private telecommunications carriers, those state regulators who choose to participate are not simply "allowed to

do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators do so is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by that "determination" to bring an action in "Federal district court" to determine whether the state regulators have met "the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the Federal Communications Commission ("FCC") performs the prescribed regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "deputized federal regulator[s]" (Pet. App. 43a), the Act mandates that the FCC "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). And like state commission "determinations under section 252," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of federal telecommunications law through section 252 agreements, notwithstanding the involvement of state regulators

in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

D. The Proceedings Below. Petitioners arbitrated and approved a federally-mandated section 252 interconnection agreement between respondents MCI and Ameritech. Following petitioners' approval of the agreement, MCI filed an action in federal district court pursuant to section 252(e)(6) of the Act seeking review of petitioners' determinations. Ameritech filed a cross-claim against petitioners and a counterclaim against MCI. Petitioners moved to dismiss the federal court action, asserting Eleventh Amendment immunity. The district court denied the motion, holding that petitioners had waived their immunity by participating in the federal regulatory scheme under the Act (Pet. App. 92a) and that, in the alternative, respondents could maintain an official capacity suit against the Commissioners under the *Ex parte Young* doctrine (*id.* at 102a).

The Seventh Circuit affirmed, holding that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two "independent" reasons. Pet. App. 6a.[1] First, the court held that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.* Second, the

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[1] The Seventh Circuit consolidated the appeal from the district court's decision in this case with four related Wisconsin cases which the Wisconsin district court had dismissed on Eleventh Amendment defense. The Wisconsin Commission and Commissioners also have filed a petition for a writ of certiorari, No. 00-653, in which they seek review of the Seventh Circuit decision below.

court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.* In reaching its conclusion on waiver, the Seventh Circuit expressly relied (Pet. App. 31a-43a) on this Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The court also noted its agreement (Pet. App. 39a-41a & n.8) with the Tenth Circuit's waiver analysis and holding in *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). With respect to the applicability of *Ex parte Young*, the Seventh Circuit "agree[d] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases" (Pet. App. 46a), and squarely rejected (*id.* at 47a-53a) petitioners' contentions that this Court's decisions in *Seminole Tribe* and *Coeur d'Alene Tribe* required a contrary result.

After the case was remanded to the district court, MCI and Ameritech jointly moved to dismiss all of their respective claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2). On October 13, 2000, the district court granted the motion and dismissed the case in its entirety. Petitioners did not appeal that dismissal, but instead filed a motion in the Seventh Circuit asking that court to recall its mandate and to vacate its judgment. On November 15, 2000, the Seventh Circuit denied petitioners' motion.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT, ON REMAND FROM THE SEVENTH CIRCUIT, DISMISSED THIS CASE, AND PETITIONERS DID NOT APPEAL THAT DISMISSAL

As an initial matter, this case is an exceptionally poor vehicle for consideration of the questions presented because the case has been dismissed. As petitioners concede (at 8), after the Seventh Circuit remanded this case to the district court, MCI and Ameritech jointly moved for a voluntary dismissal of their claims. On October 13, 2000, the district court granted the motion and dismissed the case in its entirety. Petitioners did not appeal the district court's dismissal order, but instead requested that the Seventh Circuit recall its mandate and vacate its judgment. In that motion, petitioners stated that "[t]he Commission believes that the district court's decision dismissing the case with prejudice prevents further appellate review in this case." Motion of Illinois Commerce Commission and its Commissioners to Recall Mandate and Vacate Judgment in Appeal 98-2127, at 4 (7th Cir. filed Oct. 23, 2000). On November 15, 2000, the Seventh Circuit denied petitioners' request. In light of these events, there simply are no remaining claims from which petitioners can claim a right to be free from litigating — and thus no conceivable reason for this Court to review the Eleventh Amendment questions presented in the petition.

Moreover, as demonstrated below, even if the district court had not dismissed the case in its entirety, there would be no "compelling reasons" (Sup. Ct. R. 10) for granting review in this case. Petitioners have neither demonstrated the existence of a circuit conflict nor shown a conflict between the court of appeals' decision and "relevant decisions of this Court." Sup. Ct. R. 10(a) & (c). To the contrary, both of the "alternative"

holdings on which the Seventh Circuit's decision rests are entirely consistent with this Court's decisions and the unanimous holdings of the courts of appeals.

II. THE SEVENTH CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY PARTICIPATING IN THE ACT'S FEDERAL REGULATORY SCHEME DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. As an initial matter, petitioners' contention (at 11) that "Congress may not use its *commerce power* to condition state participation in the federal scheme on a state's waiver of its constitutional sovereign immunity" improperly conflates two distinct legal concepts: waiver and abrogation. As this Court's decisions — especially *College Savings* — make clear, the former involves voluntary action by the states, while the latter occurs through unilateral Congressional action. *Seminole Tribe* established that Congress may not use its Article I Commerce Power to abrogate a state's Eleventh Amendment immunity. But petitioners' argument radically transforms that principle into the untenable proposition that Congress may not invite states to participate in the regulation of private actors through a federal regulatory scheme.

Petitioners expressly recognize (at 13) that "Congress may have the power under the Commerce Clause to preempt the states from regulating intrastate telecommunications (or allow the states to continue to regulate)," yet they ignore the well settled doctrine that federal regulation under the Commerce Power does not present Congress with an all or nothing choice. To the contrary, as this Court consistently has held, "where Congress has the authority to regulate private activity under the Commerce Clause * * * [Congress may] offer States the choice of regulating that activity according to federal standards or

having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *FERC* v. *Mississippi*, 456 U.S. 742, 761-71 (1982); *Hodel* v. *Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 288-89 (1981). That is precisely what Congress has done in the 1996 Act.

The Seventh Circuit thus properly determined that the scope of Congress' authority to solicit waivers of Eleventh Amendment immunity does not turn on which of Congress's Article I powers authorized the pertinent legislative enactment in the first place. See Pet. App. 42a-43a (noting that "[t]he only difference between the classic example of a Spending Clause gratuity of federal funds and a waiver in our cases is that, with the Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator"). As the Tenth Circuit explained, "[t]he key to constructive or implied waiver under *College Savings Bank* is the voluntariness of the state waiver, not the particular power pursuant to which Congress enacted the statute. Under *College Savings Bank*, Congress may not exact or force a waiver from a state pursuant to any of its Article I powers." *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 937 n.4 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). In short, the fact that the Congress has provided conditional benefits to the states pursuant to different Article I powers — the Compact Clause in *Petty*, the Spending Clause in *Dole*, and the Commerce Clause here — has no bearing on the constitutional validity of Congress's actions.

B. Petitioners next posit a conflict between the Seventh Circuit's holding that the Illinois Commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity and this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). This

purported conflict results from a misreading of both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would

* * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

C. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

Notably, petitioners do not question the broad scope of Congress' authority, under the Commerce Clause, to enact legislation regulating local telephone competition. Nor could they. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). What petitioners appear not to grasp, however, is that, in the present context, Congress *has exercised* that very authority to enact a comprehensive federal legislative scheme governing certain aspects of local telecommunication competition. As this Court has noted, the states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and as a consequence they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements and to the approval or rejection of statements of generally available terms — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress to impose new obligations on incumbent LECs that are intended to foster a pro-competitive, de-regulatory national policy. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participating in the administration of a federal regulatory program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to serve as deputy federal regulators, it must consent to review of its actions in federal court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

As the foregoing demonstrates, petitioners simply are wrong in asserting that "states have jurisdiction" to perform their responsibilities under the Act "to begin with" and do not have to "agree to specific conditions to obtain such jurisdiction." Pet. 16. The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The

opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot escape the consequences of its voluntary action. In short, as the Seventh Circuit carefully explained, its decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000) ("by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity"), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593).

Petitioners strain to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the

preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.[2]

III. THE SEVENTH CIRCUIT'S HOLDING THAT THE PSCW COMMISSIONERS COULD BE SUED UNDER THE EX PARTE YOUNG DOCTRINE IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

A. Prior to the Seventh Circuit's decision in this case, two other federal courts of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. In *Michigan*

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[2] Petitioners' do not (and cannot) cite a single case in which a court has held that the Act does not make sufficiently clear that the consequence of accepting Congress' invitation to perform federal regulatory functions is consent to suit in federal court. Indeed, even the Wisconsin district court (cited at Pet. 19) that ultimately (and erroneously) held that the Eleventh Amendment barred respondents' suits, concluded that the Act "provides clear notice to the states that their commissions will have to defend their rulings in federal court." *Wisconsin Bell, Inc.* v. *Public Serv. Comm'n*, 27 F. Supp. 2d 1149, 1156 (W.D. Wis. 1998); see also *Wisconsin Bell, Inc.* v. *Public Serv. Comm'n*, 57 F. Supp. 2d 710, 716 (W.D. Wis. 1999) (reaffirming that the Act "provides a clear warning" to state regulators), *rev'd on other grounds sub nom. MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653). Every other court that has addressed the issue of which we are aware has reached the same conclusion. See, *e.g.*, *MCI Telecommunications*, 216 F.3d at 938 ("Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity").

Bell Tel. Co. v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The principal basis on which petitioners seek this Court's review is a purported conflict between the Seventh Circuit's decision and this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). Petitioners' contentions are way off the mark.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the

requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. at 159-60. Just last Term in *Alden* v. *Maine*, the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757. The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

Under this Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Both MCI's complaint and Ameritech's counterclaim/cross-claim easily meet this test, because each (i) alleges that the commissioners required the inclusion of certain provisions as part of an approved interconnection

agreement that imposes prospective, binding obligations on Ameritech and that the mandated inclusion and enforcement of those provisions and obligations is inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 12a-13a.

2. Petitioners' contention (at 20-29) that the Seventh Circuit's decision conflicts with *Ex parte Young* itself is manifestly incorrect.

a. First, petitioners cannot point to any authority for their novel theory (see Pet. 20-23) that Congress must specifically authorize an *Ex parte Young* remedy. Indeed, were that the case, *Ex parte Young* would have been decided differently, because there is no indication that Congress specifically authorized the *Ex parte Young* remedy approved in that case.[3]

b. Petitioners' contention that a party must allege a "constitutional violation" in order to invoke *Ex parte Young* (Pet. 23-27) is contradicted by numerous decisions of this Court and the federal courts of appeals. Under long established precedent, a party seeking to restrain state action may, consistent with the Eleventh Amendment, maintain a suit "when the action sought to be restrained is without the authority

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[3] Petitioners are wrong in suggesting (at 21) that the remedies available to correct erroneous state commission determinations under section 252(e)(6) differ from those available to correct erroneous determinations by the FCC when it acts in the place of non-participating state commissions under section 252(e)(5). In either case, the relevant section 252 determinations are subject to federal judicial review, and a court of appeals reviewing an FCC determination under the Hobbs Act is no less authorized to order prospective injunctive relief than is a federal district court reviewing the actions of state regulators performing the same federal regulatory functions. In either case, the court's function is to ensure that those who administer the statute adhere to the dictates of federal law.

of state law or contravenes the *statutes* or Constitution of the United States." *Cory* v. *White*, 457 U.S. 85, 89 (1982) (emphasis added) (quoting *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 297 (1937)). In other words, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), whether the source of that federal law is the Constitution, a federal statute, a federal regulation enacted under statutory authority, or federal common law. See *MSA Realty Corp.* v. *Illinois*, 990 F.2d 288, 291 (7th Cir. 1993) ("the federal courts may exercise jurisdiction over suits alleging violations of federal constitutional *or statutory law* that are brought against state officials") (emphasis added); 17 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4232 (1988) (Under *Ex parte Young*, a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly *or because it is contrary to a federal statute or regulation* that is the supreme law of the land") (emphasis added).[4]

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[4] Petitioners also suggest that an *Ex parte Young* action improperly interferes with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 26-27. Contrary to petitioners' suggestion, they do not have a right to misapply federal law without being held accountable for their actions. Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act. As this Court held in *Ex parte Young* itself, state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the

c. Finally, petitioners contend that the Seventh Circuit erred in allowing respondents to proceed under *Ex parte Young* because respondents "sought a declaration that the ICC violated the law in the past" (Pet. 29), and thus did not allege the "ongoing violation" that *Ex parte Young* requires. Petitioners' suggestion that their orders have no "ongoing" effects and, at most, constitute past violations of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

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enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint (and counterclaim/cross-claim) properly alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in its agreement with MCI are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought operates prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, *et al.*,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RULES

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I. The Petition Presents a Justiciable Controversy that the Court Should Decide.

On July 24, 2000, the Seventh Circuit issued an opinion and entered judgment in this case, No. 98-2127, affirming the district court's denial of the Illinois Commerce Commission and its Commissioners' (collectively "ICC") motion to dismiss based on Eleventh Amendment grounds. Pet. App. 54a. The case was before the court on interlocutory appeal under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[1]

On August 3, 2000, the ICC moved to stay the mandate in case No. 98-2127 pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending the filing of a petition for a writ of certiorari in the Supreme Court. The court denied the motion on September 22, 2000, and the mandate issued, returning jurisdiction to the district court.

On October 10, 2000, respondents MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI") and Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois"), moved in the district court to voluntarily dismiss all of their claims. On October 13, 2000, the district court granted their motion without calling the case, and dismissed the case with prejudice. The ICC first learned that the motion was granted on October 17, 2000, the date the motion was scheduled to be heard.

On October 23, 2000, the ICC asked the Seventh Circuit to recall its mandate and vacate its judgment. The

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[1] *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 147 (1993) (appeal of district court order denying a claim of Eleventh Amendment immunity permissible under the collateral order doctrine).

ICC requested that the court follow its customary practice to vacate a judgment when a case becomes moot on appeal. On November 15, 2000, the Seventh Circuit denied the motion in a summary order without reasons.

The Seventh Circuit's denial of the ICC's motion precludes a finding of mootness in this case. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1390 (2000) (internal quotations and brackets omitted). Although the specific claims brought by the carriers are moot, the issues presented in the petition for certiorari are very much alive and continue to have ongoing effects on the parties.

The Seventh Circuit's decision requires the ICC to defend claims brought under section 252(e)(6) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("Act") in federal court. The district court's dismissal of the carriers' claims has not, as best as we can discern, affected the Seventh's Circuit's judgment. The Seventh Circuit's judgment is still in place and, insofar as that judgment has not been overturned or vacated, is binding on the ICC. The ICC seeks review of that coercive judgment in this Court.

The Court confronted a similar situation in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), and determined the case was not moot. There, the city sought review of a decision striking portions of its public indecency ordinance. *Id.* at 1390. Respondent Pap's A.M, the plaintiff below, sought to have the case declared moot because it no longer operated a nude dancing establishment in Erie. *Id.* The Court held that the case was not moot because the decision the city sought review of imposed an ongoing injury on the city. The Court explained:

> The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.

Id.

Like the city in *City of Erie*, the ICC has an ongoing injury from the Seventh Circuit's decision. The court determined that Illinois constructively waived its sovereign immunity from suit in federal court by failing to forbid the ICC from performing its responsibilities under the Act. Pet App. 43a n.10. Alternatively, the court held that the suits could proceed against the individual commissioners under the *Ex parte Young* doctrine. *Id.* at 45a. As a consequence, the ICC is forced to litigate section 252(e)(6) claims in federal district court. That injury is "real and immediate" and, hence, precludes a finding of mootness. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

In fact, there are several cases brought by respondents Ameritech Illinois and MCI against the ICC pending in the United States District Court for the Northern District of Illinois, cases affected by the Seventh Circuit's decision. Two have been stayed or otherwise held in abeyance pending disposition of this appeal. *Illinois Bell Tel. Co. v. Mathias*, No. 98-2686 (N.D. Ill. filed May 1, 1998); *MCIMetro Access Transmission Serv., Inc. v. Illinois Commerce Comm'n*, No. 99-7999 (N.D. Ill. filed Dec. 8, 1999). Ameritech Illinois recently brought two more actions against the Commissioners under section 252(e)(6) of the Act in federal district court. *Illinois Bell Tel. Co. v. Mathias*, 00-8168 (N.D. Ill. filed Dec. 28, 2000); *Illinois Bell Tel. Co. v. Mathias*, No. 00-7050 (N.D. Ill. filed Nov. 8, 2000). Thus, there has been no dissipation in the

controversy and the litigation between the parties over the issues presented in the petition continues.

In addition, the parties have a legally cognizable interest in the outcome. The respondent carriers seek to preserve a judgment in their favor that allows them to bring section 252(e)(6) actions against the ICC in federal court, notwithstanding the Eleventh Amendment bar. Respondents United States and the FCC seek to uphold an interpretation of the Act that allows claims against state commissions and their commissioners to be brought by private parties under section 252(e)(6). The petitioners seek to overturn the Seventh Circuit's judgment that compels them to litigate such claims in federal court. A determination by this Court that the Eleventh Amendment bars section 252(e)(6) actions against the ICC (or that section 252(e)(6) does not confer jurisdiction on federal district courts over state commissions (or their commissioners)) will require reversal of the Seventh Circuit's judgment, dismissal of the carriers' actions pending in federal district court, and preclude future claims brought under section 252(e)(6) against the ICC. Accordingly, the parties have a personal stake in the outcome of this case and the ICC continues to suffer harm that a favorable decision by this Court will remedy.

Additional considerations militate against a finding of mootness. The respondent carriers voluntarily dismissed their claims only after receiving a favorable decision from the Seventh Circuit. They now suggest that the case is moot. MCI Br. 13-14; Amer. Br. 7. In *City of Erie*, the Court noted that "[its] interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." *City of Erie*, 120 S. Ct. 1382, 1390-91.

The public interest in having an authoritative ruling on these important issues is compelling. The Court has already noted that the implementation of the Act is of substantial local and national importance. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 397 (1999). Many state commissions and individual commissioners have been forced to litigate section 252(e)(6) actions in federal court. In addition, many carriers (including Ameritech Illinois and MCI), faced with the uncertainty of whether a state or federal venue is proper, have filed parallel actions in both state and federal courts, increasing the burden on the judiciary. The United States and the FCC have intervened in this case to defend the constitutionality of the Act. All parties recognize the importance of the issues raised in the petition. The issues are well-defined and have been brought into sharp focus by adverse litigants for the Court's review. Accordingly, this case is not moot and presents an exceptional case for review.

II. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings*, Supreme Court Precedent and the Constitution.

Nothing in respondents' briefs in opposition calls into question the need for this Court to review and reverse the decision below.

1. Ameritech Illinois' contention (Amer. Br. 8-9) that Congress may use its commerce power to *condition* a state's participation as a regulator in the federal scheme on waiver of the state's sovereign immunity ignores the bedrock principle of constitutional law that the federal government is one of limited and enumerated powers. The Commerce Clause empowers Congress to regulate interstate commerce, not to regulate state sovereign immunity. *See New York v. United States*, 505 U.S. 144

(1992) ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Ameritech Illinois errs in treating each of Congress' Article I powers as equivalent. None of the Court's cases it cites (Amer. Br. 9) stand for the proposition that Congress may in the exercise of its commerce power demand, as a condition for state participation under the Act, the waiver of the state's sovereign immunity.

2. Respondents err in contending that constructive waiver under the Commerce Clause survived *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999). *College Savings* rejected the doctrine of constructive waiver under the Commerce Clause and confirmed that a state's waiver must be a deliberate, express waiver made by the state itself. *Id.* at 680-83.

In addition, respondents' characterization of the states' role in regulating local telecommunications as "deputized federal regulators" regulating on behalf of Congress is erroneous. *See, e.g.*, Amer. Br. 12. "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart." *New York v. United States*, 505 U.S. at 188. Congress reserved to the states important responsibilities in implementing sections 251 and 252 of the Act. That the ICC was called upon to interpret and apply a federal statute does not transform it into a "deputized federal regulator" any more than the conduct of a state court in interpreting and applying federal law transforms that court into a federal

one. Moreover, respondents' characterization denigrates the states' sovereignty and their place in our federal system. The Act in no way supports this view of the states' role, and there is no indication that Congress intended to treat the states in such a manner.

Contrary to the United States' view, the Act does not confer "*new* regulatory authority" on the states. (U.S. Br. at 21). The states have always had (and continue to have) the inherent authority to regulate local telecommunications under their police powers. Section 252(e)(5) provides a backstop remedy when a state commission fails to carry out its responsibilities under section 252. *Iowa Utilities*, 525 U.S. at 406 (Thomas, J., dissenting). It does not represent an "offer" to regulate (U.S. Br. 15-16), let alone constitute a *quid pro quo* condition requiring states to waive their immunity in exchange for fulfilling their section 252 responsibilities.

III. The *Ex parte Young* Exception Applies Only to Ongoing Constitutional Violations by State Officials.

Respondents err in contending that application of the *Ex parte Young* exception to the Eleventh Amendment does not require a constitutional predicate. Amer. Br. 18-19; MCI Br. 18-19; U.S. Br. 23 n.13. *Ex parte Young*, 209 U.S. 123 (1908), involved alleged constitutional violations. *Id.* at 144, 159-60, 168 (affirming order of federal court enjoining the Minnesota Attorney General from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment). This Court's subsequent decisions have limited application of the *Ex parte Young* exception to alleged constitutional violations. Indeed, this Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), reaffirmed that the principle of state sovereign immunity embodied in the Eleventh Amendment is a

constitutional limitation on the federal judicial power in Article III. *Id.* at 733. Respondents' contention impermissibly seeks to expand that exception to encompass the circumstances in this case.

The cases cited by respondents involve the Constitution, whether by virtue of the Supremacy Clause or other constitutional provisions. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265-66 (1997) (Supremacy Clause); *Green v. Mansour*, 474 U.S. 64, 65-66 (1985) (Supremacy Clause and Fourteenth Amendment); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 155-56 (1978) (Supremacy Clause and Commerce Clause); *Edelman v. Jordan*, 415 U.S. 651, 653 & n.1 (1974) (Supremacy Clause and Fourteenth Amendment); *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 290 (7th Cir. 1993) (Fourteenth Amendment). *Cory v. White*, 457 U.S. 85 (1982), did not involve an alleged violation of the Constitution, federal law or state law. *Id.* at 86, 91.

Regarding the particular circumstances of this case, respondents concede that the ICC is authorized by federal law to interpret and apply federal law in arbitrating and approving agreements under the Act. *E.g.*, Amer. Br. 2. They cite to no authority, for there is none, to support the proposition that, given the authority to make decisions, an allegedly erroneous decision by state officials overrides a state's sovereign immunity.[2] In fact, this

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[2] In footnote 4 of its brief Ameritech Illinois misconceives the sovereign immunity issue as one of discretion. The issue here is not whether the ICC "ha[s] a right to misapply federal law," but rather whether an allegation that the ICC has misapplied federal law overrides Illinois' sovereign immunity and allows private parties to bring suit against the state in federal court. Amer. Br. 19 n.4. As the Court's opinions establish, it is the power of the state official to make the decisions in the first place, and not the correctness of a

Court has already rejected such a proposition. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 113 n.22 (1984) ("*Pennhurst II*").

In addition, Ameritech Illinois contends (Amer. Br. 20-21) that the ICC's arbitration determinations have ongoing "effects" or "legal consequences" that warrants application of the *Ex parte Young*. This contention is without merit. The focus of the *Ex parte Young* inquiry is on actions of state officials, and the relevant inquiry is whether prospective relief could prevent an ongoing *violation* of federal law by state officials. *Pennhurst II*, 465 U.S. at 102-03. No party in this case claimed a present, ongoing *violation* by the Commissioners.

The ICC, "in carrying out its function as an arbitrator," resolved open issues and imposed appropriate conditions on the parties to the agreement. 47 U.S.C. § 252(b)(5), (c). Afterwards, the parties incorporated those determinations into their agreement and submitted it for approval as required by section 252(e)(1). The relief sought by MCI and Ameritech Illinois is from a past ICC arbitration decision that they incorporated into their agreement.[3] *Han v. Department of Justice*, 45 F.3d 333, 338

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particular decision, that is relevant to the sovereign immunity analysis.

[3] The cases cited by Ameritech Illinois are inapposite. In *Papasan v. Allain*, 478 U.S. 265 (1986), the state officials were alleged to be in violation of federal law at the precise moment the case was filed. *Id.* at 282. Here, however, respondents do not contend that the Commissioners themselves were violating federal law when the claims were filed. In *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir. 1998), plaintiff railroads sought to enjoin the state board's collection of taxes, and not the completed tax assessments. *Id.* at 539, 543. Significantly, the railroads specifically alleged that the state

(9th Cir. 1995). The agreement itself does not constitute an ongoing violation for purposes of *Ex parte Young*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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officials threatened to collect the taxes. *Id.* at 539. Here, however, the carriers seek relief from a past ICC arbitration decision that they incorporated into their agreement and the carriers did not allege that the Commissioners have enforced or threatened to enforce the specific terms of the agreement alleged to violate federal law.